Indiana Department of Education

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RECENT DECISIONS

Recent Decisions is a periodic communication from the Legal Section of the Indiana Department of Education to the Indiana State Board of Education, the Indiana Board of Special Education Appeals, Administrative Law Judges/Independent Hearing Officers, Mediators, and other constituencies involved in or interested in publicly funded education. Full texts of opinions cited or documents referenced herein may be obtained by contacting Kevin C. McDowell, General Counsel, at (317) 232-6676 or by e-mail at <kmcdowel@doe.state.in.us>.

In this Issue:

SUSPICIONLESS DRUG TESTING: FRONTIERS OF "CONSTITUTIONAL MUSTER"

The Indiana State Board of Education (SBOE), under a former rule, required as a part of the Performance-Based Accreditation (PBA) process that public schools and nonpublic schools seeking accreditation provide rather generally for "disaster plans," including warning systems, the posting of evacuation routes, and procedures for responding to adverse weather conditions, fires, earthquakes, and nuclear disasters. The SBOE has promulgated a new rule, 511 IAC 6.1-2-2.5. While this rule contains many of the former provisions, it is considerably more detailed. In addition to the "appropriate warning systems" and "posting of evacuation routes," each school corporation is to consult with local public safety agencies and develop a written emergency preparedness plan for each school in the school corporation that includes, at a minimum, the following:

- Procedures for notifying other agencies and organizations.
- Emergency preparedness instruction for staff and students.
- Public information procedures.
- Steps that will be taken prior to a decision to evacuate buildings or dismiss classes.
- Provisions to protect the safety and well-being of staff, students, and the public in case of:
    - fire;
    - natural disaster, such as tornado, flood, or earthquake;
    - adverse weather conditions, including extreme heat;
    - nuclear contamination, such as power plant or transport vehicle spills;
    - exposure to chemicals, such as pesticides, industrial spills and contaminants, laboratory chemicals, and cleaning agents (see, for example, I.C. 20-8.1-8-1);
    - manmade occurrences, such as student disturbance, weapon, weapon of mass destruction, contamination of water supply or air supply, hostage, and kidnaping incidents.

An increasing number of public school districts are utilizing drug testing of students and certain staff under the belief that such testing will protect "the safety and well-being" of the school district. The drug testing is occurring both where there is individualized suspicion of drug and alcohol use or where there is a demonstrable compelling interest in ensuring safety and security that diminishes personal expectations of privacy. In the latter situations, courts, including the Supreme Court, have approved the use of random, suspicionless drug-testing procedures. However, the courts do require there be a compelling governmental interest; a demonstrable need for suspicionless searches, such as urinalysis testing; a showing that "individualized suspicion" searches would be unworkable in addressing the concern (usually safety); the scope of the search is reasonably related to the objective; and the use of the testing results be confined to addressing the objective rather than to detect crimes.

Because U.S. Supreme Court decisions have created gradations of privacy expectations, including gradations within a public school environment, trying to balance public and private interests has resulted in a number of constitutional challenges to school-initiated, suspicionless drug-testing procedures. Courts are seemingly less concerned with individual privacy rights where the school activity is "extracurricular" and voluntary, although there is increased judicial scrutiny of the survey methods utilized as a basis for demonstrating the need for such suspicionless searches. Although litigation is expected to continue on this subject, including in Indiana, a clearer picture is emerging as to what will pass constitutional muster and what will not.

The U.S. Supreme Court has issued four important drug-testing decisions:

1. Vernonia Sch. District 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386 (1995), upholding the random testing of student athletes.

2. Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1295 (1997), holding that a state cannot constitutionally require candidates for state office to submit to a drug test.

3. National Treasury Employees Union v. Von Rabb, 489 U.S. 656, 109 S.Ct. 1384 (1989), ruling that it is permissible to test U.S. Customs officers who carry firearms or hold positions directly related to drug interdiction.

4. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct. 1402 (1989), upholding the urinalysis testing of railroad employees who violate safety rules or are involved in train accidents.

All four of these decisions address constitutional guidelines for determining when it is reasonable to require drug testing in the absence of individualized suspicion.

Drug Testing of Students:

In Vernonia, the court, by a 6-3 count, overturned the Ninth Circuit's decision that found constitutionally defective the random drug testing through urinalysis of students wishing to participate in school-sponsored activities. The 9th Circuit's decision was in contrast to an earlier 7th Circuit decision that found no such constitutional infringements. See Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988), which concentrated more on the health and safety factors inherent in athletic participation and cheerleading.

Justice Anton Scalia, writing for the majority, noted that the school district had shown the deleterious effects of drugs on motivation, memory, judgment, reaction, coordination and performance of its students. The effects were manifested in increasingly rude and disrespectful behavior as well as serious sports-related personal injuries. The school tried less intrusive measures to address the drug problems (speakers, materials, presentations, drug-sniffing dog), but the problem did not abate. The school proposed a "Student Athlete Drug Policy" and invited

parents to review it and have input at a special meeting. The parents who chose to attend gave the policy unanimous approval. The governing body thereafter approved the policy.

A public school district stands *in loco parentis* for many purposes, Justice Scalia added. A school has custodial and tutelary responsibility for children entrusted to it. Such children have rights appropriate for their status, but these rights are not the same as those of an adult. Finding no Fourth Amendment violation, the court observed: "For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases." The court specifically mentioned diphtheria, measles, rubella and polio and also noted that "most public schools provide vision and hearing screening and dental and dermatological checks. Others also mandate scoliosis screening at appropriate grade levels." (Internal punctuation has been omitted.) "[S]tudents within a public school environment have a lesser expectation of privacy than members of the population generally," quoting New Jersey v. T.L.O., 469 U.S. 325, 348; 105 S. Ct. 733 (1985).

"Legitimate privacy expectations are even less for student athletes.... Public school locker rooms, the usual sites for these activities [dressing, undressing, showering], are not notable for the privacy they afford," the court wrote, citing with favor to the 7th Circuit's Schaill decision. Students who chose to participate in athletics voluntarily subject themselves to a higher degree of regulation of behavior than other students generally. "[S]tudents who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."

The court also found that the manner of collecting urine samples and conducting urinalysis did not involve any great degree of intrusiveness personally and screened only for drugs and not for the presence of other conditions, such as epilepsy, pregnancy, or diabetes. The results are disclosed only to a limited, defined class of school personnel and are not turned over to law enforcement officials or used for any internal disciplinary sanctions. The court especially noted with favor the nonpunitive aspect of the school's policy. However, the court expressed concern over the school's requirement that students advise the school in advance of any prescription medications they may be taking that may result in a falsely positive test.

Although the school district's policy and program called for drug testing in the absence of individualized suspicion, the school district nonetheless articulated a "compelling state interest" in diminishing the physical, psychological and addictive effects of drugs on school-aged children entrusted to the school, especially when "maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor," quoting Hawley, "The Bumpy Road to Drug-Free Schools," 72 Phi Delta Kappan 310, 314 (1990).

While the court found no constitutional infirmity with the District's policy—the "reasonableness" standard having been met by the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—the court left this

warning: "We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."

Indiana has had two important decisions since Vernonia, one passing judicial muster while the other did not. In Schaill, the 7th Circuit expressed reluctance to extend random, suspicionless drug testing through urinalysis beyond athletic participation and cheerleading, specifically indicating such searches may be improper "of band members or the chess team." Schaill, 864 F.2d at 1319. See Lopez, *infra*. But Schaill was decided in 1988. With increasing concerns over school safety and security, as in the "state of rebellion" described in Vernonia, the courts are struggling with what is proper and improper in a school context.

1. In Todd v. Rush County Schools, 983 F.Supp. 799 (S.D. Ind. 1997), affirmed, 133 F.3d 984 (7th Cir. 1998), *cert. den.*, 119 S.Ct. 68 (1998), the local school board approved a school-wide drug testing program that would prohibit a high school student from participating in any extracurricular activity or driving to school unless the student and the student's parent or guardian consented to a test for drugs, alcohol, or tobacco in random, unannounced urinalysis exams. Relevant procedures of the program included:

    * An initial positive detection will be retested immediately using a method with a higher degree of accuracy.

    * If the test remains positive, the student and parent are informed and provided an opportunity to explain to the principal why a result might be positive, such as a student's prescription medication. Parents are given the names of agencies that may be able to assist students.

    * Without an explanation, the student is barred from extracurricular activities until a retest is passed.

    * Positive test results are reported to persons in charge of extracurricular activities on a need-to-know basis.

    * A student can request an immediate retest, but the cost for such a retest would be borne by the student's family. A student is permitted only one retest at the school's expense. The student could wait until the next round of school-sponsored retests, but the student would be banned from participation during this time.

    * Positive results are not used in the school-based disciplinary process, although these could be subpoenaed in criminal or juvenile proceedings. A student who tests positive twice is considered under "reasonable suspicion" and can be retested at any time. Tests based upon a "reasonable suspicion" do subject students to disciplinary proceedings.

The program demonstrated that since its inception, there has been a measurable decease in the numbers of students testing positive, although tobacco use remains the primary finding from the tests.

Unlike past programs that withstood judicial scrutiny, the "empirical data available in [this] case is somewhat slight." Id., at 803. There was no widespread drug, alcohol, or tobacco use. "There is no consistent increase or decrease in numbers [of students being disciplined for alcohol, drug, or tobacco use] over the years with numbers in all categories fluctuating from year to year." A 1994 survey indicated that tobacco use was higher than the state average, which in turn was higher than the national average. Alcohol use increased as students moved through high school, but marijuana use was lower than the state rate.

"Extracurricular activity" was not confined to athletic teams or cheerleading, as in Vernonia and Schaill. It also included the Student Council, Fellowship of Christian Athletes, Future Farmers of America, and the Library Club. "Extracurricular programs are a privilege at the High School. However, they are considered valuable to the school experience, and participation may assist a student in getting into college." Id., at 803.

Of the 950 students at the High School, 728 signed with the program. Plaintiffs were among the ones who did not sign. One plaintiff videotaped football programs, while another was a member of the Library Club. Plaintiffs challenged the program as an unreasonable search under the Fourth Amendment (and analogous Indiana law). The court rejected their arguments, finding that:

a. Although it is true students do not "shed their constitutional rights...at the school-house gate," Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503, 506; 89 S.Ct. 733, 736 (1969), it is likewise true that students do not enjoy the same level of constitutional protection where a school official conducts a search based upon a "reasonable suspicion." New Jersey v. T.L.O., 469 U.S. 325, 346; 105 S.Ct. 733, 745 (1985).

b. A urinalysis drug-testing program qualifies as a "search" for the purpose of applying the Fourth Amendment.

c. Although individualized suspicion is generally necessary as a predicate for a search by a school official, there are "particularized exceptions to the main rule" where a school district can demonstrate and justify the need to institute a random drug-testing program to address an actual problem.

d. Although the school district in this case relied upon data which is "not particularly indicative of drug, alcohol or tobacco use by a majority (or even a large minority) of the students," Todd, at 805, "the evidentiary hurdle for a public school is lower than in other contexts." Id.

e. The program had no significant opposition from the community during the planning stages. Id., at 806. Because there is "no minimum triggering point of substance abuse...that must be met to justify" the institution of such a program, there must be at least some use of prohibited substances in order to "give rise to

legitimate concern about the potential for a rapid increase in abuse, if unchecked." Id. There was sufficient data to support this.

f. Precedent involved athletics and cheerleading where drug use created a special hazard of injury. However, "all public school students have a diminished expectation of privacy" although athletes have even lower expectations. The threat of injury while driving to school may be greater than the threat during athletic competition. "While chess or debate matches may seem to pose little risk of physical harm, traveling to and from them can include risks exacerbated by drug and alcohol use." Id., at 806.

g. Although not all extracurricular activities are related to athletics, "[p]articipation...is voluntary and a privilege; any student joining these activities is subject to regulation beyond that of a non-participant." Id. In addition, any student who is involved in an extracurricular activity assumes to some degree a "leadership role" in the school community and is expected to "serve as an example to others." Id. "[T]he school has an interest in the conduct of those who may serve as an example to others." Id.

The district court's decision was affirmed on appeal. See Todd v. Rush County Schools, 133 F.3d 984 (7th Cir. 1998). In a footnote to its decision, the 7th Circuit pointed out that its decision does not address the constitutionality of the drug-testing program as applied to a student's right to drive to and from school because the issue was not presented for judicial scrutiny. Todd., Note 1, 133 F.3d at 986. The U.S. Supreme Court declined to review the decision. 119 S.Ct. 68 (1998).[1]

2. Willis v. Anderson Community School Corporation, 158 F.3d 415 (7th Cir. 1998), involved a student who was suspended for fighting with another student. Under the school's drug-testing policy, he was to be tested for drug and alcohol use. Willis refused to provide a urine sample and was suspended again. If he refused to submit to the test upon his return from his second suspension, he would be deemed to have engaged in unlawful drug use and would be suspended a third time, pending expulsion. Willis sought injunctive relief from the federal district court, but was denied. The district court then entered judgment in favor of the school district. However, the 7th Circuit reversed the district court. The school board adopted its policy in August of 1997, following input from various school and community constituents and in response to growing disciplinary

[1]There are critics of the Todd decision, who note that the U.S. Supreme Court decision in Vernonia was a 6-3 one, with the majority assuring that its holding was intended to be restricted to athletic programs in schools that were experiencing immediate and severe drug problems. "To extend suspicionless searches from school athletes to all participants in extracurricular activities is not a small step," wrote Lawrence F. Rossow and Jerry R. Parkinson in *School Law Reporter*, Vol. 40, No. 3 (March 1998). "If the step can be taken from athletics to all extracurricular activities by relying on Vernonia, it seems easy to take the next logical step—require drug testing of the entire student body."

problems and a perceived increase in drug and alcohol use among students. In addition to testing of students where there is individualized suspicion, the policy also required the testing of any student who possesses or uses tobacco products; is suspended for three or more days for fighting; is habitually truant; or violates any other school rule that results in at least a three-day suspension. As in Todd, the purpose of the drug-testing procedure was to intervene and address drug and alcohol use and not to punish. Test results were provided to affected parents and known only to certain designated school officials. A student did experience disciplinary sanctions if he failed to participate in a drug education program or refused to submit to the test.

Even though students are protected from unreasonable searches by public school officials, school officials do not have to establish probable cause to justify the search of a student. Individualized suspicion that a student is violating a school rule or law will justify a search that is reasonable in scope, such as searching book bags and jacket pockets. At 417-18, citing New Jersey v. T.L.O. and Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993), involving a partial strip search of a student suspected of "crotching" drugs. However, where there is no individualized suspicion, there would need to be a "compelling governmental interest" apart from crime detection and mere deterrence from unwanted activity. The 7th Circuit noted that Willis and his fellow combatant had been ushered into the Dean of Student's office immediately after the altercation, in accordance with the school's discipline procedures. The Dean testified that he did not observe anything untoward in Willis' demeanor or behavior that would suggest drug and alcohol use. He stated the only reason Willis was required to submit to the test was because he was in a fight. At 418. The court stated that such a meeting with a high-ranking school official distinguishes these circumstances from other permissible suspicionless drug-testing programs that have satisfied judicial analysis, such as in Vernonia and Todd. At 424. There is also the lack of voluntariness present in other public school contexts. At 422. The school's data was not sufficient to establish conclusively a reasonable suspicion of substance abuse when a student is suspended for fighting, (at 419), nor did the school demonstrate that a suspicion-based (individualized suspicion) approach would be unworkable, thus justifying the generalized approach in the school's policy (at 420-21). The following are pertinent holdings:

a. "When the government alleges such a [special] need [for suspicionless drug testing], courts decide whether the search is reasonable by undertaking 'a context-specific inquiry, examining closely the compelling private and public interests advanced by the parties.'" At 420, citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. at 619 (1989).

b. "[A] context-specific inquiry is appropriate when 'concerns other than crime detection...are alleged in justification of a Fourth Amendment intrusion.'" Id., citing Chandler v. Miller, 117 S.Ct. At 1301 (1997).

c. A "special needs" analysis would require a showing that "a suspicion-based approach is unworkable." Id.

d. "[I]t may be that when suspicion-based search is workable, the needs of the government will never be strong enough to outweigh the privacy interests of the individual." At 421.

e. The school's policy lacks the voluntariness and restricted use to extracurricular activities inherent in other cases. "[I]n *Vernonia* and *Todd* drug testing could be construed as part of the 'bargain' a student strikes in exchange for the privilege of participating in favored activities. In the present case, however, such testing is a consequence of unauthorized participation in disfavored activities." At 422. Although the expectation of privacy by students attending public school are less than the population as a whole (at 421), "their privacy interest is nonetheless stronger than that of the students discussed in *Vernonia* and *Todd*."

f. Deterrence from drug and alcohol use is insufficient to support a suspicionless drug-testing program. Even though a suspicionless approach will "round up" more wrongdoers, "the Supreme Court has not sanctioned blanket testing. Nor has it renounced the proposition that the Fourth Amendment normally requires individualized suspicion." At 422-23.

3. The 7th Circuit in Willis at 422 noted the recent decision in Trinidad School Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998), which involved a student suspended from the high school marching band for refusing to submit to a suspicionless drug test required by the school district's policy for all participants in extracurricular activities. The Colorado Supreme Court found the policy unconstitutional as to the marching band. The school's drug-testing policy was based upon a two-year study of drug and alcohol use among students in grades 6-12. The resulting policy was similar in most respects to the policy in Todd, *supra*. A survey conducted for the school described drug and alcohol use generally, but did not quantify the results. As such, there was no evidence indicating increased drug and alcohol use among band members. Indeed, testimony, indicated band members were considered well behaved and "were leaders of the student body in academic performance." At 1099. "Without a discrete study focused on a particular subset of the entire student population, no conclusion can be drawn about the rate of drug use in that subset," the court noted at 1103. The court also distinguished "marching band" from extracurricular activities. Although ostensibly "extracurricular," participation in the marching band was required in order to earn credit in two for-credit classes that are part of the regular curriculum.

Participation in the "marching band" for Lopez was not a voluntary activity. The court observed that the school's policy was overboard based on three facts:

a) "the Policy swept within its reach students who were enrolled in for-credit, instrumental music classes and participated in marching band";
b) "the Policy included student groups that were not demonstrated to have contributed to the drug problem in the District"; and

c) "there was no demonstrated risk of immediate physical harm to members of the marching band."

At 1109. The court also rejected the notion that there is a lesser degree of privacy expected by participants in extracurricular activities than by the student population as a whole. The type of "communal undressing" common among athletes in Vernonia is not an expected or common activity among members of the marching band.[2]

LEGAL SETTLEMENT

The Indiana State Board of Education (SBOE) continues to review a host of legal settlement issues. Although the Indiana Code provides statutory guidance at I.C. 20-8.1-1-7.1 and I.C. 20-8.1-6.1-1, determinations are often fact-sensitive.[3] The following are important constructions of certain statutory provisions regarding legal settlement, financial responsibility, and expulsion.

When Legal Settlement Cannot Be Determined

Under current law, a student placed in a state-licensed private or public health care facility, child care facility, or foster family home through the local or state welfare agencies (Division of Family and Children or DFC), by an agency licensed by DFC, or by a court order has the right to "attend school" in the school corporation in which the home or facility is located.[4] If the student does not have legal settlement in the school corporation providing the educational services, the school corporation serving the student is entitled to transfer tuition from the school corporation where the student does have legal settlement. I.C. 20-8.1-6.1-5(a).

This does not address the circumstance where the student does not have "legal settlement" in any

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[2]The court also described the school's procedures for ensuring there is no tampering with a urine sample. "To prevent the possibility of sample tampering, the water to the rest room was cut-off and blue dye was placed in the toilet bowls. In addition, students were required to empty their pockets prior to proceeding to the rest room." At 1100.

[3]See particularly *In the Matter of C.K., C.K., and K.K. and the Northwestern School Corporation (Howard County),* **Cause No. 9608011** (SBOE 1996), involving a family that lived in the school district and attended the public schools there since 1983. They bought property within the school district upon which to build a house. However, when school started, the house was not finished, notwithstanding the representation of the builder that it would be finished by August of 1996. Because they had sold their current house, they had nowhere to live within the district and, as a consequence, temporarily resided outside the school. The SBOE rejected the school's argument the family did not have legal settlement. All indications were the family lived in the district. The temporary disruption did not alter their legal settlement. The decision can be found in Recent Decisions 1-12:96.

[4] "Attend School" is a malleable concept. It essentially means receiving educational services from the school corporation where the home or facility is located. This can occur in a typical school environment or in another place, such as the home, a hospital, or the facility. See I.C. 20-8.1-1-7.2.

public school corporation. This was the case in *Shoals Community School Corporation v. Evansville-Vanderburgh School Corporation*, **Cause No. 9702002** (SBOE 1998). The student in question was placed through the Martin County Division of Family and Children into a foster home in the Evansville-Vanderburgh School Corporation. The student's last known legal settlement had been within the Shoals Community School Corporation. However, his mother, from whom he had been removed because of neglect, moved from Shoals to another state. Her parental rights were never terminated. She moved from Shoals before the student was placed in a foster home in Evansville. The Martin County DFC notified Shoals that Martin County considered Shoals to be the school corporation of legal settlement. The SBOE found this notification to be of no legal effect because only the SBOE, under I.C. 20-8.1-6.1-10(a)(3)(A), and a juvenile court, under I.C. 20-8.1-6.1-1(a)(7)(A)(iii), can determine legal settlement for this student. Because a juvenile court did not do so, the SBOE has jurisdiction. The SBOE determined that Shoals was not obligated to pay transfer tuition to Evansville. The decision is included as *Attachment A.* What is not answered—because it wasn't raised—is who is the responsible party to pay transfer tuition to Evansville?

The answer could have been "No one." Indiana law requires the school corporation where the facility or home is located to provide educational services to a student, irrespective of legal settlement. But there is no provision to pay transfer tuition to a school corporation where the student has no legal settlement anywhere in Indiana. This was the case in *In Re the Legal Settlement of J.F.*, **Cause No. 9802006** (SBOE 1998). The student had lived with his parents within the boundaries of the Tippecanoe School Corporation. The student was removed from his home by the Tippecanoe County DFC. The parents later moved to Clinton County, but the Tippecanoe County Superior Court terminated their parental rights. The parental rights were terminated before he started school. The biological parents whereabouts are now unknown. The parental rights were terminated before the student was placed in a foster home in the Benton Community School Corporation in Benton County. Benton Community Schools unsuccessfully sought payment of transfer tuition from school corporations in both Tippecanoe and Clinton Counties. The SBOE rejected Benton's alternative argument that the school corporation where the court was located should be responsible. The definition of "parent" at I.C. 20-8.1-1-3 does not include courts. The SBOE noted that, given the termination of the parental rights, it does not matter where the biological parents reside: They no longer have any legal rights, responsibilities, or obligations for the custody, control or support of the student. As such, the residence of the biological parents will not establish legal settlement for the student.

The SBOE also noted in a brief discussion section that the resolution of this seeming inequity to Benton Community Schools lies with the General Assembly, which has not made provisions for reimbursing public school corporations providing educational services to students who do not have legal settlement. See *Attachment B.*

Expulsion for Lack of Legal Settlement; "Member of the Administrative Staff"

As noted above, the SBOE and juvenile courts have jurisdiction in determining the legal settlement of a student. However, local school districts are empowered to conduct hearings to determine legal settlement of students. Where there is a finding that the student does not have

legal settlement, the student can be expelled from school.[5] I.C. 20-8.1-5.1-11. This "expulsion" does not carry with it the additional sanctions associated with expulsions for disciplinary reasons, such as parental participation in addressing disciplinary measures and limitations on enrollment and re-enrollment. See, for example, I.C. 20-8.1-5.1-23(e).

In *In Re the Matter of T.J.*, **Cause No. 9802004** (SBOE 1998), the Metropolitan School District (MSD) of Lawrence Township expelled T.J. for lack of legal settlement. The parent timely appealed to the SBOE. However, the SBOE did not treat the review as an administrative appeal but vacated the decision below and conducted a *de novo* hearing to determine legal settlement of the T.J. The school-based hearing examiner was the administrative assistant to the Assistant Superintendent of the school district. The SBOE noted that I.C. 20-8.1-5.1-13(a) permits the superintendent of a public school corporation to appoint "[a] member of the administrative staff..."to conduct the expulsion meeting. Although the appointed hearing officer was an administrative assistant to a member of the administrative staff, she was not a member of the "administrative staff." The term "administrative staff" is defined as a school employee who is a licensed teacher and has supervisory authority. I.C. 20-8.1-1-6. Notwithstanding the SBOE's vacation of the local determination, the SBOE found that the original decision was correct. T.J. did not have legal settlement within the MSD of Lawrence Township (*Attachment C*).[6]

Guardianships for Educational Reasons

Recent Decisions 1-12:95 reported on several important decisions of the SBOE, construing the meaning of I.C. 20-8.1-6.1-1(a)(3) in not granting legal effect to guardianships established "solely" or "primarily" for educational purposes. The SBOE has ruled that it does not have the authority to interfere with a lawfully issued guardianship that does not, on its face, indicate the purpose for the guardianship was "solely" or "primarily" for educational purposes. *In Re A.S.C. and J.F.O. and the Tippecanoe School Corporation*, **Cause No. 9410026** (SBOE 1995). However, the SBOE will not find legal effect in a court-issued guardianship that is "solely" or "primarily" for educational purposes because such guardianships are not recognized by law. *In Re H.W., H.H., J.H. and Z.H. and New Prairie United School Corporation*, **Cause No. 9601001** (SBOE 1996), where the guardianship papers indicated the reason was for attendance in a specific school corporation.

The SBOE visited this dilemma recently. In *Edinburgh Community School Corporation v.*

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[5]Prior to 1995, this was referred to as an "exclusion" and not an expulsion. Previous law required a local school district, as a part of the exclusion process, to identify the public school corporation where the student should attend, to notify the parent or guardian of the right to appeal an adverse decision to the SBOE, and to stay exclusion until the SBOE had concluded its review. Current law does not require the local school to identify where the student should attend, nor does current law require the school to notify the parent of administrative review rights or maintain the student's placement pending review. However, the right to administrative review by the SBOE is still available. See I.C. 20-8.1-6.1-10(a)(1), conferring upon the SBOE the right to review "[a]ll appeals from an order expelling a child under IC 20-8.1-5.1-11."

[6]It is noteworthy that the school allowed the student to remain in school pending review by the SBOE. Several school districts have voluntarily done so.

Franklin Community School Corporation and C.R.P., A Student, **Cause No. 9809028** (SBOE 1999), Edinburgh's governing body determined it needed to be more pro-active in legal settlement matters. It directed its superintendent to review suspected instances and act accordingly. C.R.P.'s biological parents resided in Edinburgh, but she attended school in Franklin. She is presently a senior. Edinburgh first notified Franklin of its concerns three years ago. Franklin inquired of C.R.P.'s legal settlement and was presented with guardianship papers from Johnson County Superior Court. The guardianship was, on its face, solely for attendance in the Franklin schools. Franklin advised the parents of the questionable legality of the guardianship. Shortly thereafter, the parents presented a revised guardianship decree, establishing guardianship with one of the grandparents but without mentioning any specific reason. A subsequent guardianship decree was made during the pendency of the hearing, substituting one grandparent for the previously named grandparent, who was now deceased. Although Edinburgh asserted it was "common knowledge" the student did not reside with the grandparent in Franklin but with her parents in Edinburgh, there was no evidence upon which to determine legal settlement other than in Franklin. The decision is included as *Attachment D.*

At oral argument on this matter, the superintendent of Edinburgh indicated—and Franklin agreed—that legal settlement is a growing problem for school districts. Challenging the legal settlement of students may be a costly and fruitless endeavor. He asked the SBOE what steps a school should take to determine legal settlement. Although the latter question was more rhetorical in nature, the recitation of facts in *T.J. and the MSD of Lawrence Township, supra,* indicates a fairly thorough process. This would not be of much assistance to Edinburgh in the instant matter, though, because *T.J.* was attending the MSD of Lawrence Township. *C.R.P.* was not attending Edinburgh, and Franklin was not contesting her right to attend their school tuition free.

INTERNATIONAL BACCALAUREATE DIPLOMA REVISITED

In Recent Decisions 1-12:95, "International Baccalaureate Program Diploma: Transfer Tuition Implications," it was reported the SBOE was moving away from denials of transfer tuition requests based upon curriculum reasons where the International Baccalaureate Program (IBP) Diploma was involved. The IBP is offered at only three Indiana public high schools (Valparaiso High School, Fort Wayne South Side High School, and North Central High School in Indianapolis). The IBP is not a specific curriculum geared toward a specific academic or vocational goal, but it does combine a number of requirements from national educational systems that, although not ensuring a recipient of acceptance at a specific college or university, can result in advance placement and course credit for a student graduating with the IBP designation. The SBOE had in the past rejected pursuit of the IBP diploma as a curricular reason for granting a transfer under 511 IAC 1-6-3. In 1996, the SBOE indicated that it may, in the future, consider the IBP as a legitimate "academic aspiration" entitling an eligible student to transfer to a school offering such a program while the student's school corporation of legal settlement would be responsible for the transfer tuition.

The SBOE has officially reversed itself. In *East Allen County Schools v. F.V.D.,* **Cause No. 9708019** (SBOE 1997), the State Board granted its first transfer based upon a student's desire to pursue the IBP diploma at Fort Wayne South Side High School, finding the student's interest in the IBP diploma to be a legitimate "academic aspiration" under the transfer tuition laws. See *Attachment E*.[7]

PRIVATE SCHOOL PLACEMENTS AND REIMBURSEMENT

When Congress reauthorized the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.* (1997), it intended to create mechanisms whereby parents and local educational agencies (LEAs) would discuss differences and thus avoid due process procedures and their attendant attorney fees. To this end, Congress required States to implement a mediation process, §1415(e), and public agencies involved in the education of children with disabilities to provide parents and guardians with more extensive, detailed notices of procedural safeguards, §1415(b), (d). One of the problem areas Congress directly addressed was the unilateral placement of children in private schools by parents who are dissatisfied with the public school program. Under §1412(a)(10)(C)(ii), (iii), a parent can be reimbursed for the cost of a private school placement if the public school "had not made a free appropriate public education [FAPE] available to the child in a timely manner prior to that enrollment. The amount of reimbursement may be reduced or denied by an Independent Hearing Officer (IHO) or a court if the parents, at the most recent IEP Team meeting ("case conference committee meeting" in Indiana), did not inform the public school of their intent to reject the public school program and enroll the student in a private school, or if the parents fail to give the public school notice of their intentions at least ten (10) business days prior to removal of the student from the public school. Reimbursement can also be reduced or denied if the public school, prior to removal of the student, informs the parent of their intent to evaluate the student but the parents fail to make the student available for the evaluation. The requirement that the parent provide notice to the public school as a precondition for full reimbursement can be excused if the parent is illiterate, there is an emergency requiring immediate placement, the public school prevented the parent from providing the notice, or the public school failed to inform the parent such notice is required. §1412(a)(10)(C)(iv). IDEA does not state that, as a precondition for reimbursement, the private school must provide the FAPE the public school ostensibly could not or would not provide. Administrative and judicial constructions, relying upon two important U.S. Supreme Court decisions (see *infra*), have held that the private schools are not required to comply with the extensive requirements of IDEA, notably the FAPE and "least restrictive environment" (LRE)

[7]Sen. William E. Alexa (D-Valparaiso) has introduced Senate Bill No. 315 in the 1999 session of the Indiana General Assembly that would establish the IB diploma as a state-sanctioned diploma similar to the Academic Honors Diploma, with the same reporting requirements under Performance-Based Accreditation and the $800 bounty allotted to school corporations for each student who successfully completes the program. The proposed bill would also establish an IB Diploma High Education Loan Program to assist certain eligible students with the costs associated with attending undergraduate programs in an approved Indiana institution of higher learning.

requirements. As a consequence, adjudicators are looking more to whether the private school provided some "educational benefit" to the student.

In the Matter of L.S. and the Nineveh-Hensley-Jackson United School Corp., Johnson County Special Programs, 28 Individuals with Disabilities Education Law Report (IDELR) 579, Article 7 Hearing No. 1000-97 (BSEA 1998), is the first special education hearing decision applying the provisions of the reauthorized Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* (1997). L.S. had been found eligible for services for a specific learning disability in the third grade. Although there were some disagreements between school district personnel and the parent during the student's third, fourth, and fifth grade years, there was cooperation and the student progressed. However, the relationship deteriorated as the student prepared to enter the sixth grade at the middle school. Direct communication between the parent and teachers was curtailed to such an extent that all such communication was required to go through the principal. As a consequence, communication broke down and essential elements of the student's sixth grade IEP were not implemented. On one memorandum submitted into evidence at the hearing stage, the teacher of record referred to the parent as a "psycho." The student began to experience anxiety problems at school. Shortly before the end of the 1996-1997 school year, the student "shut down." In August of 1997, the parent enrolled the student in a private school that deals primarily with students with learning disabilities. The private school was determined by the Independent Hearing Officer (IHO) to have provided the student an appropriate education, while the school's proposed IEP was found inappropriate. As a consequence, the IHO ordered the school to reimburse the parent the private school tuition and transportation costs. The IHO noted that the parent did fail to provide the notice required by §1412(a)(10)(C)(iii), but the IHO also noted that the school failed to advise the parent that such notice of the parent's intent to enroll the student in a private school is required. The school is required to so inform parents under §1412(a)(10)(C)(iv)(IV) and §1415(b)(7). The school could not rely upon the parent's failure to provide notice when the school also failed to provide notice.

The school sought administrative review by the Indiana Board of Special Education Appeals (BSEA). The BSEA, following oral argument, substantially upheld the IHO's decision, except that the Board found insufficient evidence that the private school was providing an "appropriate education" for L.S. The Board noted the reauthorized IDEA does not require the private school to offer an "appropriate education" as a precondition for reimbursement. The BSEA did determine that the private school provided some educational benefit to the student, and accordingly, upheld the IHO's award to the parent of tuition and transportation costs. The school did not seek judicial review.[8]

A remarkably similar finding has been made by the 6th Circuit Court of Appeals in addressing an appeal from the District Court for the Northern District of Ohio. In Cleveland Heights-University Heights City School District v. Boss, 144 F.3d 391, (6th Cir. 1998), the court found

[8]Written decisions of the BSEA are not included as attachments with this edition of Recent Decisions. All written decisions of the BSEA are available on-line at the web site for the Indiana Department of Education's Legal Section. Please see *www.doe.state.in.us/legal/*.

the parents' request for reimbursement for a private school placement for the child's fourth grade was untimely. However, the court upheld the district court's finding that the school district failed to propose an appropriate program through an Individualized Education Program (IEP) for the fifth grade year and, as a consequence, awarded the parents reimbursement for the fifth grade placement at the private school, which served only students with learning disabilities. In upholding the district court, the 6th Circuit noted that the proposed IEP was in "draft" form and would not have been implemented until after school had started. The IEP lacked the required objective criteria for measuring progress. This, the court found, was not a "technical violation" of IDEA. The circuit court also rejected the school district's assertion that the private school could not provide a FAPE because, due to its emphasis on students with learning disabilities, the private school could not meet the "mainstreaming" requirements of IDEA. That is, the private school, due to its specialized population, could not ensure the student was educated to the maximum extent appropriate with peers without disabilities, often referred to as the "least restrictive environment" or LRE. The district court, after reviewing Burlington v. Department of Education, 471 U.S. 359 (1985) and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 114 S.Ct. 361 (1993), held that "[n]o court has yet decided whether the IDEA's mainstreaming requirement can be used to bar reimbursement [for unilateral placements into private schools]." Accordingly, the court held the parents need to show the public school district's proposed program was inadequate, and are not required to show the private school complied with all aspects of the IDEA in order to recover expenses associated with the private school placement. Also see David P. v. Lower Merion School Dist., 29 IDELR 23 (E.D. Pa. 1998), granting a parent reimbursement for one semester at a private placement for the student's ninth grade year, reiterating that IDEA's "extensive" procedural and substantive requirements do not apply to private schools. To receive reimbursement, the court wrote, a parent must satisfy a two-part test: (1) their child's IEP prepared by the school district is inappropriate, and (2) their alternative placement is proper. At 26. The court did not order reimbursement for a "crisis intervention" placement because the placement was not related to educational need. See also Horry County School District v. P.F., 29 IDELR 354 (D. S.C. 1998), upholding, in part, a denial of reimbursement to the parent, who established a "private school" in her law office, using a legal secretary as a "teacher's aide" and an unlicensed adult as a "teacher." The court found the school did offer an appropriate education, including residential placement, and that the parent's unilateral placement was not "proper," referring to the placement as "a sophisticated babysitting service." The court added at 367: "Although a private school placement need not comply with all the IDEA requirements in order to be 'proper,' it must offer specialized instruction from qualified teachers and services reasonably designed and calculated to provide the disabled child with educational benefits."

The failure of a public school to provide an appropriate education during one school year does not carry over to the next school year. Where a parent refuses to participate in the IEP development process and does not challenge the program offered by the school, the parent is precluded from reimbursement for a private school placement. Yancey v. New Baltimore City Bd. of Sch. Com'rs, 24 F.Supp.2d 512 (D. Md. 1998). "To hold that private school tuition is reimbursable based on prior years' violations of the IDEA would permit a parent to enroll his or her child in private school indefinitely at taxpayer expense, even if the public school could

provide the child with a free appropriate public education simply by modifying the IEP and its implementation." At 514-15.

ADMINISTRATIVE REVIEW: FAILURE TO FILE TIMELY

In the Matter of L.M. and the Brownsburg Community School Corporation, West Central Joint Services, 27 IDELR 1129, Article 7 Hearing No. 999-97 (BSEA 1998) began as a hearing regarding reimbursement for an out-of-state residential school unilaterally made by the parents. The parents were represented by legal counsel throughout the proceedings. After receiving evidence and testimony, the IHO found against the parents and in favor of the school, finding that the school did offer the student a FAPE. The IHO's written decision contained the standard appeal right found at 511 IAC 7-15-5(u), notifying the parties that anyone aggrieved had thirty (30) calendar days from receipt of his decision to seek review by the BSEA. The parents' counsel received his written decision on February 18, 1998, but did not file his Petition for Review until March 23, 1998. The school filed a Motion to Dismiss on March 25, 1998, asserting the Petition for Review was untimely as it was not filed by March 20, 1998. The parents' counsel responded, representing that he mailed the Petition on March 21, 1998. However, the envelope was date-marked March 23, 1998. In granting the school's Motion to Dismiss, the BSEA noted that service on a party's attorney is considered service on the party, I.C. 4-21.5-3-1(c), and that the filing was late. The date-mark on the envelope indicated March 23, 1998, as the mailing date. Under I.C. 4-21.5-3-1(f)(2), the date for filing a document under the Administrative Orders and Procedure Act (AOPA) is the date of the postmark on the envelope, if mailed by U.S. Mail. In addition, the BSEA rejected the parents' counsel's assertion that the BSEA has routinely permitted late filings in the past. The BSEA has never permitted a late filing where a party is represented by legal counsel. Because no sufficient justification was presented to the BSEA, they exercised their discretion under 511 IAC 7-15-6(h) and dismissed the Petition.

The parents sought judicial review. However, the federal district court granted the school's Motion to Dismiss because the parents had not exhausted their administrative remedies. See L.M. v. Brownsburg Community School Corporation, and West Central Joint Services, 29 IDELR 374 (S.D. Ind. 1998). The court found that it was within the discretion of the BSEA to dismiss the administrative Petition for Review. However, a dismissal by the BSEA on timeliness grounds is not appealable to court under the judicial review scheme in IDEA. Judicial review is dependent upon an impartial administrative review of the substantive issues. In this case, the BSEA dismissed the Petition on procedural grounds. Because the parents failed to pursue their available administrative remedies under Indiana law when they failed to timely appeal the IHO's decision, they have not exhausted their administrative remedies and, as a consequence, cannot appeal to federal district court. The court also noted, in footnote 6, 29 IDELR at 376, that the parents could have "easily prevented" the dismissal by the BSEA by requesting, under 511 IAC 7-15-6(j), an extension of time to prepare and file their Petition for Review. "Instead, they chose to file an untimely appeal and place the dismissal of their action within the discretion of the BSEA."

GRADE SANCTIONS UNRELATED TO ACADEMIC PERFORMANCE

In developing policies to enhance school attendance and improve student behavior, some schools have devised policies that impose certain grade reductions related solely to nonacademic behavior and not to academic performance. Although there are remarkably few cases in this area, there appears to be increasing judicial disfavor with the imposition of grade sanctions by administrators on students for nonacademic behavior. There does not seem to be such disfavor if the grade reductions are determined by teachers and are related to misbehavior related to academic requirements. There have been several important decisions in this area, especially in Indiana, including an important complaint investigation report addressing federal and state special education laws.

1. Smith v. School City of Hobart, 811 F.Supp. 391 (N.D. Ind. 1993) has drawn considerable attention and commentary. In Smith, three high school seniors left school to attend an off-campus class in medical biology. Enroute, they stopped at one of their homes and drank beer. Smith was suspended for five days and, in addition, had her grade reduced 20 percent in each class for the semester. Smith did not challenge her suspension, but she did challenge the grade reductions as a violation of substantive due process due to the alleged excessive, arbitrary, and capricious nature of the grade sanctions. The court agreed the school policy providing for grade reductions of four percent for each day a student is suspended is invalid as violating substantive due process. The following are pertinent findings by the court:

    a. "While the issue of reducing a student's grades as punishment for nonacademic conduct is not well-settled in this country, or Indiana for that matter, a general consensus can be reached as to what a student's grades should represent. A student's grade or credit should reflect the student's academic performance or achievement, including participation in class, and presence in class. Reducing grades unrelated to academic conduct results in a skewed and inaccurate reflection of a student's academic performance." At 397.

    b. The school's rule "is unreasonable and arbitrary on its face. The parties stipulated that 'the grade reductions were not imposed for lack of effort of academics, but were imposed as part of the disciplinary action to discourage the consumption of alcohol during school hours. By the School's own admissions the sanctions were imposed on Smith as a disciplinary measure and not imposed due to a lack of effort in academics." At 398-99.

    c. "To warrant an academic sanction, a student's misconduct must be directly related to the student's academic performance, and there is no indication in this record that such is the case." At 399.

d. "The rule at hand gives the teacher no discretion in whether to deduct a student's grade for their suspension, which may lead to arbitrary results in practice, that is, disproportionate punishment for an incident." Id.

e. "[T]he Court declares the rule that calls for a grade reduction to discipline nonacademic conduct illegal, and null and void." Id.

2. The Smith decision contains an impressive review of case law and agency opinions from across the country, but it relied primarily upon cases from Illinois and Pennsylvania, especially Katzman v. Cumberland Valley Sch. Dist., 479 A.2d 671 (Pa. Cmwlth. 1984), a case of first impression on this issue in Pennsylvania. Katzman, while on a field trip to New York City, ordered and drank a glass of wine in a restaurant. She was suspended for five days, excluded from classes, expelled from the cheerleading squad, prohibited from all school activities during the suspension, permanently expelled from the National Honor Society, and had her grades reduced by ten points each (two percentage points per class for each day suspended). The student did not challenge any of the sanctions imposed except the grade reductions. The court found the grade reductions improper because the assessed penalty affected the full grading period (nine weeks) rather than the five days she was suspended. "Of course," the court added at 675, "for college entrance and other purposes this would result in clear misrepresentation of the student's scholastic achievement. Misrepresentation of the student's scholastic achievement is equally improper and, we think, illegal whether the achievement is misrepresented by upgrading or by downgrading, if either is done for reasons that are irrelevant to the achievement being graded."

3. Complaint No. 1305.98. Complaint investigations are required under IDEA where there is raised an allegation that a public agency is violating a state or federal special education law. See 34 CFR §§300.660-300.662 and 511 IAC 7-15-4. In Indiana, such investigations are conducted by the Division of Special Education (DSE) within the Indiana Department of Education.[9] Under IDEA, a public agency may expel a student with disabilities, but must ensure that educational services do not cease during the period of expulsion. 20 U.S.C. §1412(a)(1)(A). In this situation, the student had been expelled. Even though educational services did not cease, the superintendent ordered that he not be given credit for the work he did. His assigned teacher said he completed the work and was entitled to credit. The DSE determined the superintendent's actions violated IDEA procedures for implementing a student's IEP and denied the student a "free appropriate public education" (FAPE), a cornerstone of IDEA. The school sought reconsideration under 511 IAC 7-15-4(h), arguing that FAPE does not include credit for completed work.

[9]Federal law requires such investigations to be conducted and a written report issued within sixty (60) days. Indiana requires the reports to be issued in thirty (30) days. 511 IAC 7-15-4(e). This permits an aggrieved party to request reconsideration by the State Director of Special Education. 511 IAC 7-15-4(h). Indiana's entire complaint process, even with reconsideration, is still completed within the federal 60-day period.

The State Director of Special Education, in declining to alter the complaint report, noted the school did not discuss credit with the student's parents within the framework of the case conference committee, Indiana's designation for the "IEP Team." See 20 U.S.C. §1414(d)(1)(B). The decision to deny credit was a unilateral decision by the superintendent and contrary to the representations of the student's teacher. The school has sought review by the U.S. Secretary of Education. Complaint No. 1315.98 is included as *Attachment F*.

4. Dunn et al. v. Fairfield Comm. High Sch. Dist. No. 225, 158 F.3d 962 (7th Cir. 1998). Plaintiffs were two student musicians in the school band. Both played guitar. The school prohibited its band members from departing from the planned musical program and especially forbade guitar solos during performances. Plaintiffs, in defiance of this rule and their teacher, played two unauthorized pieces at a basketball game. Both received an "F" for the band course. The failing grade prevented one plaintiff from graduating with honors. The plaintiffs were aware that band performances were a part of the grading system. They were also aware that school policy, as prepared by the teacher, warned that conduct at performances had to be professional and failure to adhere to this standard could have dire consequences. The policy, in part, read:

> ...Performance conduct that is not of the highest standard will be dealt with severely. Possible disciplinary actions range from loss of all points for the performance to lowering of the final grade to dismissal from the band.

At 963. The ill-fated guitar solos were also conducted in direct defiance of the plaintiffs' teacher, who "was shouting at them to stop, but they ignored her." Id. The teacher did not grant them performance points. She thereafter referred the matter to the principal, who, in turn, disciplined them for their disrespect to faculty and staff by removing them from Band class and prohibiting them from attending any more home basketball games for the remainder of the season. This resulted in both students receiving "F" grades, but did not prevent them from graduating.

The court, while expressing "doubts about the wisdom of the severity of Fairfield's sanctions against the rebel musicians," nevertheless rejected the students' claims that the punishment was "cruel and unusual" and was a denial of substantive due process rights. As the court noted at 966:

> Although students may have some rights while they are in school [citation omitted], education itself is not a fundamental right [citation omitted]. That means that Fairfield's decision to stack the deck so that these students would fail Band must be sustained unless it is wholly arbitrary. Here, however, Dunn and McCullough freely conceded that they had violated a school rule, that the rule was designed to preserve discipline in the classroom and to punish student insubordination, and that these were legitimate interests on the part of the school district. That alone is enough to show that their claim cannot possibly succeed.

> The Constitution does not guarantee these or any other students the right not to receive an "F" in a course from which they were excluded because of misbehavior.

ATTORNEY FEES AND COMPLAINT INVESTIGATIONS

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq*. (1997) allows a parent to recover reasonable attorney fees should the parent ultimately prevail in administrative or judicial proceedings regarding the special education program for their child with disabilities. 20 U.S.C. §1415(h)(3). Also see 511 IAC 7-15-6(q). IDEA, however, does not dictate the time period within which a parent must seek attorney fees in a civil court with jurisdiction. For this reason, there are various time periods in each state as courts borrow analogous time frames from respective laws of affected states. In Indiana, the 7th Circuit Court of Appeals adopted the thirty (30) day period found at I.C. 4-21.5-5-5 for judicial review of final administrative decisions and applied it to attorney fee requests under IDEA. See Powers v. Indiana Department of Education, 61 F.3d 552 (7th Cir. 1995). See Recent Decisions 1-12:95.

This issue was revisited in Wagner v. Logansport Community School Corporation, 990 F.Supp. 1099 (N.D. Ind. 1997). Wagner began as Article 7 Hearing No 873.96. An Independent Hearing Officer (IHO) was appointed pursuant to 511 IAC 7-15-5. After a two-day hearing, the IHO rendered a decision that ordered changes to the child's Individualized Education Program (IEP).[10] The IHO's decision contained the standard notification that a party has thirty (30) calendar days to appeal the decision to the Indiana Board of Special Education Appeals (BSEA). Neither party appealed.

When all of the IHO's orders were not implemented timely by the school, the parents filed a complaint with the Indiana Department of Education's Division of Special Education (DSE).[11] Although the IHO's decision was rendered on April 30,1996, all issues concerning the student's educational program were not resolved until October 21 of that year, when the DSE's Complaint Investigation Report was issued (Complaint No. 1077.96). The parties had negotiated attorney fees between June 20 and August 1, 1996, when the parents' attorney rejected the school's settlement offer. The parents filed their suit for attorney fees in a state civil court. The school removed the case to federal court and moved for summary judgment.

The court, in granting summary judgment to the school, noted that Powers is controlling law in Indiana. Hence, the 30-day statute of limitations period for appeal of administrative

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[10]Neither IHOs nor The Indiana Board of Special Education Appeals (BSEA) declare whether or not a party has "prevailed." This is left to the parties to discuss and resolve, or, absent resolution, request a court to determine. See 511 IAC 7-15-6(q).

[11]Complaint investigations address allegations that a public agency has violated state or federal special education laws. 34 CFR §300.660-300.662, 511 IAC 7-15-4.

adjudications will apply to claims for attorney fees arising out of IDEA disputes. At 1102. Attorney fee claims under IDEA are ancillary to the underlying educational dispute and are not independent causes of action. Id. A complaint investigation report is not an administrative adjudication.

The court also rejected the argument that a 30-day period is too short a period of time so as to be unfair. The parents were represented by counsel, the Powers case had been published, and the IHO advised them of the 30-day appeal right. In addition, "[t]he brevity of the statute of limitations is not of particular cause for concern here where the filing date was missed by months, rather than by days or weeks." Id. The court also noted that neither opposing counsel nor the Indiana Department of Education was obliged to inform the parents of the time period for seeking fees. They had constructive notice.

The thirty-day time period began to run when the IHO issued her decision on April 30, 1996, and not on October 21, 1996, when the DSE issued its written complaint investigation report.[12] Enforcement proceedings are not analogous to administrative appeals, and thus do not delay accrual of the claim for attorney fees. At 1103.

The IHO's written decision became final and irreversible thirty (30) days after she issued it when neither party sought appeal to the BSEA. Her decision was issued on April 30. On May 30, her decision was final and irreversible because no appeal had been requested. The parents had thirty (30) days from May 30, 1996, to file their claim for attorney fees in a civil court with jurisdiction. At 1104.

SCHOOL ATTENDANCE AND "PROPER NOTICE"

Indiana's Compulsory School Attendance Act, I.C. 20-8.1-3 *et seq.*, requires parents, guardians, or a person "operating or responsible for an educational, charitable, or benevolent institution or training school" to ensure children under their respective care attend public school or be "provided with instruction equivalent to that given in the public schools." I.C. 20-8.1-3-34, I.C. 20-8.1-3-36. A person who fails to ensure attendance of a school-aged child commits a Class B Misdemeanor. I.C. 20-8.1-3-37[13] It could also be neglect where a child's parent, guardian, or custodian is unable or refuses to supply adequate educational opportunities. I.C. 31-34-1-1. If the neglect is such that the child is deprived "of education as required by law," the crime could be a Class D Felony. I.C. 35-46-1-4(a)(4). However, there are no published Indiana cases defining either "equivalent instruction" or "educational neglect."

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[12]Courts do not review complaint investigation reports. Federal and state law provide for ultimate review by the U.S. Secretary of Education. 34 CFR 300.661(d), 511 IAC 7-15-4(j).

[13]Although current statutory provisions date from 1973, compulsory attendance laws have been in effect in Indiana since 1897. It was also a misdemeanor in 1897 to fail to ensure school attendance of one's child or charge. For a related article, see "Habitual Truancy," **Quarterly Report** Jan.-Mar.:97.

Hamilton v. Indiana, 694 N.E.2d 1171 (Ind. App. 1998) addresses a procedural prerequisite when prosecuting a parent, guardian, or custodian for failure to ensure a child attends school. Hamilton was convicted of two Class D Felonies for neglect and two Class B Misdemeanors for failing to ensure her two children attended school. During a six-month period, one child had ten (10) unexcused absences while the other had four (4) unexcused absences. The Court of Appeals reversed the convictions, noting that the State, in order to convict a person of the crime of "Failure to Ensure School Attendance," must prove "beyond a reasonable doubt that a person (1) knowingly, (2) failed to ensure that her child attended school, (3) as required by Indiana's compulsory attendance law." At 1172. The court also found the school did not provide the parent "proper notice of a child's failure to attend school." The school's attendance officer notified Hamilton by regular mail of her children's absences. However, under I.C. 20-8.1-3-33(b), service by regular mail is insufficient to constitute "personal service." "Personal notice" requires personal delivery of the notice, service by certified mail, or the leaving of notice "at the last and usual place of the residence of the parents." "Personal notice" is a prerequisite to the institution of proceedings against a parent for violation of the Compulsory Attendance Act.

The court also reversed the felony convictions for Neglect of a Dependent.

> Although we have found no reported decisions in Indiana where an individual has been convicted of neglect for depriving a child of education, a plain reading of the Neglect of a Dependent statute reveals that the State is required to prove more than a person's violation of the compulsory attendance law in order to convict the person of felony neglect.

At 1173. The court did acknowledge that "we can foresee circumstances where a parent's failure to comply with the compulsory attendance law could result in a child being deprived of knowledge and training." However, there was no such showing in Hamilton's situation. Id.

WHEELCHAIR TRANSPORTATION LIMITATIONS

The Indiana State School Bus Committee (SSBC), as established by I.C. 20-9.1-4, has rule-making authority for a variety of transportation-related activities, including standards for the construction and equipment of school buses and performance standards to determine whether one has the physical ability to be a school bus driver. Its rules are found at Title 575 of the Indiana Administrative Code (IAC). One of its rules addresses requirements for the transportation of students with disabilities. One rule in particular has been challenged a number of times. 575 IAC 1-5.5-3(g) provides as follows:

> (g) A wheelchair transported in a school bus cannot exceed fifty-three (53) inches in length and two hundred (200) pounds in weight, excluding the weight of the occupant, and thirty (30) inches in width.

Recent improvements in medical care and wheelchair design have resulted in students with significant physical involvement being able to attend school with their peers. However, it is not uncommon to have the student's wheelchair exceed the SSBC's regulation, seemingly prohibiting them from being transported on Indiana school buses. Transportation is usually provided separately through the use of vans. Transportation by vans is statistically more dangerous for a wheelchair user than transportation by a school bus. Federal laws that prohibit nondiscrimination on the basis of disability, notably Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act, proscribe the use of state and local laws as reasons for failing to provide reasonable accommodations to a qualified person with a disability. See, for example, 34 CFR §104.10(a). A qualified person with a disability who is a student is to be afforded equal opportunity to participate in educational programs and in nonacademic services, the latter specifically including "transportation." See §104.37(a)(1). Removal from the typical transportation provided to students without disabilities would require individualized consideration.

In the Matter of New Albany-Floyd County Consolidated Schools, **Cause No. 1-98** (SBSC 1998) addresses this dilemma. The school corporation sought a waiver from the SSBC of the weight limits for a high school student with significant physical limitations. The student had been transported previously by school bus. However, when he began using a new wheelchair that was medically necessary, the weight limit was exceeded. The school transported the student by van while appealing the SSBC's denial of the waiver. Transportation by vans is four times more dangerous than transportation by school buses. Because the student is a qualified person with a disability under federal nondiscrimination laws, the appeal was assigned to an impartial hearing officer (IHO). The IHO conducted a hearing, finding in favor of the school corporation and ordering the SSBC regulation waived for the student. Her decision is *Attachment G*.

Date

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BEFORE THE INDIANA
STATE BOARD OF EDUCATION

Shoals Community School Corp., Petitioner	)	
and	)	**Cause No. 9702002**
Evansville-Vanderburgh Sch. Corp., Respondent	)	
Transfer Tuition Dispute: Determination of Legal Settlement of J.K.Y. under I.C. 20-8.1-6.1	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Synopsis

This dispute evolved from a placement of J.K.Y. in a foster family home in Evansville, where he attended school for a part of the 1995-1996 school year. The Evansville-Vanderburgh School Corporation sought payment of transfer tuition from the Shoals Community School Corporation, the last public school where J.K.Y. had been enrolled prior to coming under State welfare care. J.K.Y.'s mother, his only known parent, did not live in Indiana during the time J.K.Y. was in the foster family placement in Evansville. Shoals declined to honor Evansville's request for transfer tuition, seeking instead a determination from the Indiana State Board of Education that J.K.Y. did not have legal settlement during the period in question. The Hearing Examiner finds that J.K.Y. did not have legal settlement, and that Shoals is not financially obligated to pay transfer tuition to Evansville.

Procedural History

The Shoals Community School Corporation (hereafter, the Petitioner) initiated on February 20, 1997, a hearing before the Indiana State Board of Education under I.C. 20-8.1-6.1-10(a)(3)(A) to determine to legal settlement of J.K.Y. during the 1995-1996 school year. A determination of legal settlement would resolve the issue of whether Petitioner owes transfer tuition to the Evansville-Vanderburgh School Corporation (hereafter, the Respondent), which provided educational services to J.K.Y. The undersigned was appointed Hearing Examiner on February 26, 1997, and so notified the parties by Notice of Appointment the following day.

Respondent, on March 3, 1997, filed a Motion to Dismiss, alleging that Petitioner did not timely appeal to the State Board of Education a previous determination of legal settlement by the Martin County Division of Family and Children. Respondent maintained also that Petitioner did not appeal to the State Board of Education (hereafter, "SBOE") within thirty (30) calendar days as required by I.C. 20-8.1-6.1-5(b).

On March 7, 1997, the Hearing Examiner denied the Motion to Dismiss, finding: (1) a county division of family and children is not authorized to make determinations of legal settlement; and (2) I.C. 20-8.1-6.1-5(b) is inapplicable to the instant dispute because the placement of J.K.Y. was not effected through a parent or guardian. The placement occurred through I.C. 20-8.1-6.1-5(a), which does not contain a specific time frame for challenging one's obligation to pay transfer tuition.[14]

The Hearing Examiner requested on May 7, 1997, the parties provide available dates for a hearing on this matter. Petitioner obtained counsel, who entered his appearance on May 21, 1997. A hearing date was established for June 25, 1997, and a notice of same was mailed to the parties on May 22, 1997. An amended Notice of Hearing was mailed to the parties on June 23,

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[14]Although the Hearing Examiner found that a county division of family and children (DFC) is not authorized to determine "legal settlement" under I.C. 20-8.1-6.1-1, the county DFC is required to provide notification to the serving school corporation and the school corporation of legal settlement of a placement made by or through the county DFC. The notification is to occur within ten days following the placement. This notification requirement is not the same as determining "legal settlement" for transfer tuition purposes. This is specifically reserved to the SBOE under I.C. 20-8.1-6.1-10(a)(3)(A) or by the court with juvenile jurisdiction which issued the order placing the student in a state-licensed private or public health care facility, child care facility, or foster family home. See I.C. 20-8.1-6.1-1(a)(8); I.C. 31-34-20-5; I.C. 31-34-21-10; and I.C. 31-37-19-6.

1997, re-setting July 22, 1997, as the hearing date.

Both parties, by counsel, jointly moved on July 21, 1997, for a continuance of the hearing and to submit the matter to the Hearing Examiner based upon a stipulation of facts. On July 22, 1997, the Hearing Examiner granted the continuance and granted the motion to submit a joint stipulation of facts. The Hearing Examiner established briefing dates for the respective parties. Both parties timely filed on August 6, 1997, the Joint Stipulation of Facts. Respective counsel timely filed on August 21, 1997, their briefs in support of their positions based upon the Joint Stipulation of Facts.

Findings of Fact

Having had same under advisement and in consideration of the Joint Stipulation of Facts and the record as a whole, the following Findings of Fact are made.

1. The Indiana State Board of Education, pursuant to I.C. 20-8.1-6.1-10(a)(3), has the authority to resolve disputes involving questions of legal settlement and any other matter arising under the transfer tuition chapter. The State Board has jurisdiction in this matter.
2. J.K.Y. was born on March 22, 1981. As such, he is under the age of 18 years and subject to compulsory school attendance.
3. On November 29, 1994, J.K.Y. was taken into custody from his mother due to alleged neglect. He was considered a "child in need of services" (CHINS). J.K.Y. remains a "ward of the court" and continues to be placed outside the home.[15] The mother is the only identifiable "parent" for J.K.Y., as this term is defined at I.C. 20-8.1-1-3 and applied to this dispute.

[15]Indiana does not define "ward of the court" or "ward of the state." Based upon the involvement of the Division of Family and Children, which is part of the overarching Family and Social Services Administration (FSSA), a State agency, J.K.Y. is more accurately a "ward of the State."

4. At the time J.K.Y. was removed from his home, his mother resided within the boundaries of the Petitioner school corporation.
5. In December 1995, J.K.Y. was placed in foster care with a relative who lived within the boundaries of the Respondent school corporation. J.K.Y. attended a middle school in the Respondent school corporation.
6. Pursuant to I.C. 20-8.1-6.1-5.5, the Martin County Division of Family and Children notified the Respondent that the Petitioner was the school corporation of legal settlement.[16]
7. J.K.Y. was removed from this foster family placement on August 31, 1996, but continues to be a ward.
8. The mother of J.K.Y., although residing within the Petitioner school corporation on November 29, 1994, moved out of the district thirteen days later (December 12, 1994) and has not returned. Her last known address was in the state of Mississippi where she has resided since at least November 21, 1995. Her parental rights have not been terminated.
9. J.K.Y. attended school within the Respondent school corporation from January 4, 1996 to June 6, 1996, while placed in a foster home with a relative.
10. No court with juvenile jurisdiction has made a determination with respect to the legal settlement of J.K.Y.

Conclusions of Law

1. As no court with juvenile jurisdiction has determined the legal settlement of J.K.Y., the Indiana State Board of Education has jurisdiction under I.C. 20-8.1-6.1-10(a)(3)(A) to make such a determination.

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[16]Whether or not this occurred within the ten (10) days required by statute cannot be determined. The notice to Respondent occurred on January 4, 1996, and followed an earlier statement which incorrectly identified a different Indiana public school corporation as the one where J.K.Y. had legal settlement. However, as noted previously, county divisions of family and children do not determine legal settlement. It appears that the notice did not occur within ten days, but no party is prejudiced by this.

2. Under I.C. 20-8.1-6.1-1(a)(1), a student's legal settlement "is in the attendance area of the school corporation where the student's parents reside" when the student is, as in this case, under the age of eighteen (18) years.
3. J.K.Y.'s mother has not had her parental rights terminated, although her rights have been restricted. For the purpose of determining transfer tuition issues, the mother continues to be the "parent" under I.C. 20-8.1-1-3. Custody of J.K.Y. has not been awarded to any other individual.[17]
5. A county Division of Family and Children is not empowered to make binding determinations regarding a student's legal settlement.
6. Because J.K.Y. did not have legal settlement within the attendance area of the Petitioner during the time he received educational services from the Respondent school corporation, the Petitioner is not obligated to pay transfer tuition to the Respondent.

Discussion

Both Petitioner and Respondent have misconceptions regarding the legal effect of the notification requirement imposed on the county under I.C. 20-8.1-6.1-5.5. This requirement, which contains no sanction for failure to comply, directs the county placing a student to notify the school corporation of legal settlement and the school corporation required to serve the student not later than ten (10) days after such a placement or a change in placement. This notification requirement does not bestow upon the county agency the power to determine "legal settlement," as that term is defined at I.C. 20-8.1-6.1-1 and I.C. 20-8.1-1-7.1. Although both parties agree the State Board of Education has the authority to make such a determination, the Respondent views this authority as essentially one of administrative review of a county's notification responsibility. The State Board of Education is not bound by a county's notification responsibility under I.C. 20-8.1-6.1-5.5. Conversely, Petitioner asserts that only the

[17]The Joint Stipulation of Facts indicate J.K.Y. was "taken into custody" under an emergency detention order alleging J.K.Y. was a CHINS. Affidavits of Michael Williams, Exhibits 1 and 2. This is vastly different from an award of custody as contemplated by the definition of "Parent" under I.C. 20-1.1-1-3. There is no evidence a court has awarded custody of J.K.Y. to anyone.

State Board of Education can determine legal settlement. This is likewise incorrect. Statute confers upon a court with juvenile jurisdiction the authority to determine, through its own findings, the legal settlement of a student over which the court has jurisdiction. I.C. 31-34-20-5; I.C. 31-34-21-10; and I.C. 31-37-19-26. Petitioner expressed concern that a juvenile court may inappropriately apply I.C. 20-8.1-6.1-1(a)(1)-(7) in making such determinations, and that the State Board should have the authority to review a juvenile court's determination. However, State Board has rejected in the past the notion that any administrative agency has reviewing authority over a judicial determination.

In In Re A.S.C., J.F.O., and the Tippecanoe School Corporation, Cause No. 9410026 (SBOE 1995), the State Board of Education rejected an analogous argument involving a court-decreed guardianship which, on its face, was not established for educational reasons. (Guardianships for educational reasons are not recognized in Indiana. I.C. 20-8.1-6.1-1(a)(3).) As noted at p.10 of the State Board's decision:

> Administrative agencies may not, by reason of their administrative powers, exercise judicial powers or control or interfere with the courts in the exercise of their judicial functions.

Had a court with juvenile jurisdiction determined the legal settlement of J.K.Y., appeal would be to the proper reviewing court and not the State Board. Conversely, a determination of legal settlement by the State Board is not subject to review by a court with juvenile jurisdiction. A civil court with jurisdiction to conduct judicial review of final administrative decisions would be the proper forum. I.C. 20-8.1-6.1-10(e). In the absence of any previous court determination of legal settlement regarding J.K.Y., the State Board is obliged to do so, subject to judicial review in a civil court with jurisdiction.

Order

The Shoals Community School Corporation is not obligated to pay transfer tuition to the Evansville-Vanderburgh School Corporation for the educational services provided to J.K.Y.

December 17, 1997 /s/Kevin C. McDowell
Date Kevin C. McDowell, Hearing Examiner

ACTION BY THE INDIANA STATE BOARD OF EDUCATION

The Indiana State board of Education, at its meeting of February 5, 1998, adopted the recommended decision of the Hearing Examiner by vote of 8-0.

APPEAL RIGHT

Pursuant to I.C. 20-8.1-6.1-10(e), a party aggrieved by the decision of the Indiana State Board of Education must seek judicial review in a civil court with jurisdiction no later than thirty (30) days from the receipt of this written decision.

Indiana
State Board of Education
Room 229, State House • Indianapolis, Indiana 46204-2798
317/232-6622

BEFORE THE INDIANA STATE BOARD OF EDUCATION

In Re the Legal Settlement of:	)	
	)	**Cause No.: 9802006**
J.F.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Procedural History

Petitioner, Benton Community School Corporation, by letter received by the Indiana Department of Education on November 13, 1997, indicated that it had been denied, by the Lafayette School Corporation and the Community Schools of Frankfort, transfer tuition costs associated with a foster child and requested "guidance in resolution to this dilemma." By facsimile transmission on February 17, 1998, Petitioner requested a hearing to determine transfer tuition owed. The letter was then referred to the Indiana State Board of Education. Pursuant to I.C. 20-8.1-6.1-10(3), the Indiana State Board of Education has jurisdiction to hear all disputes concerning legal settlement and transfer tuition. The Lafayette School Corporation and the Community Schools of Frankfort have been identified as Respondents in this matter. The undersigned was appointed as hearing officer on February 19, 1998, and on that date sent notice of the appointment to all three school corporations. The parties were requested to notify the hearing officer of available dates for a hearing. The hearing in this matter was subsequently scheduled for April 6, 1998. The parties were notified of their due process rights in the hearing. The issue for hearing was the legal settlement of the Student and the responsibility, if any, of either of the respondent school corporations for the payment of transfer tuition.

Present for the hearing were Lewis Sproull, Business Manager and Treasurer and Dr. Glenn Krueger, Superintendent, for Benton Community School Corporation, Robert Foreman, Business Manager for Lafayette School Corporation, and Deborah Horton, Business Manager and Dr. R. Joseph Dixon, Superintendent for the Community Schools of Frankfort. An informal prehearing conference was held prior to the commencement of the hearing. Witnesses were sworn and testimony was heard. During the course of the hearing, Petitioner presented eleven exhibits which were admitted into evidence without objection.

After consideration of the testimony and a review of all exhibits, the hearing officer makes the following findings of fact, conclusions of law, and recommended order:

FINDINGS OF FACT

1. The student was born on June 23, 1989. He was a kindergarten and first grade student in the Benton Community School Corporation during the 1995-1996 and 1996-1997 school years.

2. In March 1990, the student's family moved from Clinton County to Tippecanoe County. The parents resided at Lot #170 Point West, West Lafayette, IN. This address is within the boundaries of the Tippecanoe School Corporation.

3. The student was removed from his home by the Tippecanoe County Division of Family and Children (DFC) in 1990.

4. In January 1992, the student's parents moved from Tippecanoe County to Clinton County.

5. On October 20, 1995, the student's parents' parental rights were terminated through an order issued by the Superior Court, Division III, of Tippecanoe County.

6. On December 15, 1995, the student was placed in his current foster home[18] within the Benton Community School Corporation. The address of the student's biological parents is unknown.

7. On January 3, 1996, the student was enrolled in kindergarten for the first time, in Boswell Elementary School within the Benton Community School Corporation.

8. At the time of the hearing the student was still a ward of the Tippecanoe County DFC. Adoption proceedings were pending.

9. IC 20-8.1-6.1-5(a) provides:
A student who is placed in a state licensed private or public health care facility, child care facility, or foster family home:
(1) by or with the consent of the division of family and children;
(2) by a court order; or
(3) by a child-placing agency licensed by the division of family and children;
may attend school in the school corporation in which the home or facility is located. If the school corporation in which the home or facility is located is not the school corporation in which the student has legal settlement, the school corporation in which the student has legal settlement shall pay the transfer tuition of the student.

[18]December 15, 1995 is the date of the student's latest placement with this foster family. The evidence indicates that there had been at least one previous placement with this family. It is quite possible that from the student's initial removal from his home in 1990 until this latest placement on December 15, 1995, he had been placed in several different settings. Because of the confidentiality of such juvenile proceedings, the parties to this hearing did not have that information available. The hearing officer does not consider the location of the foster placements during the student's preschool years to be relevant.

10. The determination of legal settlement is governed by I.C. 20-8.1-6.1-1(a), which provides: The legal settlement of a student shall be governed by the following provisions:

(1) If the student is under eighteen (18) years of age, or is over that age but is not emancipated, the legal settlement of the student is in the attendance area of the school corporation where the student's parents reside.

(2) Where the student's mother and father, in a situation otherwise covered in subdivision (1), are divorced or separated, the legal settlement of the student is the school corporation whose attendance area contains the residence of the parent with whom the student is living, in the following situations:

(A) Where no court order has been made establishing the custody of the student.

(B) Where both parents have agreed on the parent or person with whom the student will live.

(C) Where the parent granted custody of the student has abandoned the student. In the event of a dispute between the parents of the student, or between the parents and any student over eighteen (18) years of age, the legal settlement of the student shall be determined as otherwise provided in this section.

(3) Where the legal settlement of a student, in a situation to which subdivision (1) otherwise applies, cannot reasonably be determined, and the student is being supported by, cared for by, and living with some other person, the legal settlement of the student shall be in the attendance area of that person's residence, except where the parents of the student are able to support the student but have placed him in the home of another person, or permitted the student to live with another person, primarily for the purpose of attending school in the attendance area where the other person resides. The school may, if the facts are in dispute, condition acceptance of the student's legal settlement on the appointment of that person as legal guardian or custodian of the student, and the date of legal settlement will be fixed to coincide with the commencement of the proceedings for the appointment of a guardian or custodian. However, if a student does not reside with the student's parents because the student's parents are unable to support the child (and the child is not residing with a person other than a parent primarily for the purpose of attending a particular school), the student's legal settlement is where the student resides, and the establishment of a legal guardianship may not be required by the school. In addition, a legal guardianship or custodianship established solely for the purpose of attending school in a particular school corporation does not affect the determination of the legal settlement of the student under this chapter.

(4) Where a student, to which subdivision (1) would otherwise apply, is married and living with a spouse, the legal settlement of that student is in the attendance area of the school corporation where the student and the student's spouse reside.

(5) Where the student's parents:

(A) are living outside the United States due to educational pursuits or a job assignment;

(B) maintain no permanent home in any school corporation in the United States; and

(C) have placed the student in the home of another person; the legal settlement of the student is in the attendance area where the other person resides.

(6) Where the student is emancipated, the legal settlement is the attendance area of the school corporation of the student's residence.

(7) Where a student's legal settlement is changed after the student has begun attending school in a school corporation in any school year, the effective date of change may, at the

election of the parent (or of the student if the student is eighteen (18) years of age or older) be extended until the end of that semester, or, at the discretion of the school, until the end of that school year. However, that election, where a student has completed grade 11 in any school year, shall extend to the end of the following school year in grade 12.

CONCLUSIONS OF LAW

1. Pursuant to Ind. Code § 20-8.1-6.1-10, the State Board of Education has jurisdiction over this matter.

2. Any Finding of Fact deemed to be a Conclusion of Law is hereby denominated as such. Any Conclusion of Law deemed to be a Finding of Fact is hereby denominated as such.

3. The student's placement in a foster care home during the 1995-1996 and 1996-1997 school years within the attendance area of Benton Community School Corporation was made by the Division of Family and Children. The placement in this foster home gave the student the right to attend school in the Benton Community School Corporation. If the Benton Community School Corporation is not the school corporation where the student has legal settlement, the school corporation of legal settlement shall pay the transfer tuition of the student. (I.C. 20-8.1-6.1-5).

4. Placement into foster care does not serve to establish a student's legal settlement within the school corporation where the foster parents reside. (I.C. 20-8.1-6.1-1(a); I.C. 20-8.1-6.1-5). The student does not have legal settlement within the Benton Community School Corporation.

5. Indiana Code 20-8.1-6.1-1(a) provides for the determination of legal settlement. Generally a student's legal settlement is determined by the residence of the parents. In this case, there is no indication that the student's parents ever resided within the Lafayette School Corporation. The facts fail to support any determination that Lafayette School Corporation can be considered the school corporation of legal settlement for this student.

6. The termination of parental rights permanently severs the legal relationship between the parents and child. The parents no longer have any rights, duties or obligations as to the custody, control or support of the child, and their consent is not required for adoption. (I.C. 31-35-6-4).

7. Once their parental rights have been terminated, the biological parents no longer are responsible to ensure the student's attendance at school.[19]

8. While the last known address of the student's biological parents was in Clinton County, within the boundaries of the Community Schools of Frankfort, the parents' parental rights were terminated prior to the student being placed into foster care within the Benton Community School Corporation and prior to the student's initial enrollment in school. As the biological parents no longer have any legal rights, responsibilities or obligations for the custody, control or

[19]Indiana Code 20-8.1-3-33 makes it unlawful for a parent to fail to ensure that his child attends school.

support of the student, there is no basis to determine that the student has legal settlement within the Community Schools of Frankfort, or any other school corporation to which the biological parents may move.

DISCUSSION

The facts presented indicated no basis for a determination of legal settlement within any of the three school corporations that are parties to this proceeding. Without legal settlement in the school corporation there can be no responsibility to pay transfer tuition.

The issues in this hearing involved the legal settlement of the student and the resulting obligation for the payment of transfer tuition by one of the respondent school corporations. This decision addresses those issues with respect to the respondent school corporations, but does not address the issue of the responsibility for tuition for a student who appears to have no legal settlement. The Indiana State Board of Education has no jurisdiction to address the speculative liability of non-parties. Indiana Code 20-8.1-6.1-1(a) makes no provision for the determination of legal settlement of students such as the one here who is a ward of the DFC, placed into foster care and has had his parents' parental rights terminated. This issue should be addressed by the Indiana General Assembly. It is not necessary to make an ultimate determination of legal settlement here, as the determination that the student does not have legal settlement within either of the respondent school districts resolves the dispute between petitioner and respondents.

RECOMMENDED ORDERS

1. The Student's legal settlement during the 1995-1996 and 1996-1997 school years was not within the Lafayette School Corporation. The Lafayette School Corporation is not responsible for the payment of transfer tuition.

2. The Student's legal settlement during the 1995-1996 and 1996-1997 school years was not within the Community Schools of Frankfort. The Community Schools of Frankfort is not responsible for the payment of transfer tuition.

Dated: May 1, 1998

/s/ Dana L. Long
Dana L. Long, Hearing Officer for the
Indiana State Board of Education

INDIANA STATE BOARD OF EDUCATION ACTION

After oral argument, the Indiana State Board of Education, by unanimous vote, affirmed the Administrative Law Judge's determination that neither the Lafayette School Corporation nor the Community Schools of Frankfort were responsible for the payment of transfer tuition.

Indiana
State Board of Education
Room 229, State House • Indianapolis, Indiana 46204-2798
317/232-6622

BEFORE THE INDIANA STATE BOARD OF EDUCATION

In Re the Matter of:	)	
	)	
T. J.	)	**Cause No.: 9802004**

Appeal of Expulsion Pursuant to
I.C. 20-8.1-5.1-11

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Procedural History

On February 4, 1998, the Student's mother sent her request for appeal of the expulsion of her son, T. J., to the Indiana State Board of Education. She claimed her son had been expelled due to alleged lack of legal settlement within the school district of M.S.D. Lawrence Township. The undersigned was appointed as hearing officer on February 17, 1998 and sent notice of such appointment to the parties. The hearing officer requested the parties to notify the hearing officer of available dates to conduct a review hearing in this matter, and also directed the school to submit the record of the expulsion proceedings. On February 25, 1998, the hearing officer received from the school a request to dismiss this appeal as the Student had not been expelled from school. The hearing officer notified the Student's mother of the receipt of the motion to dismiss and directed her to respond to the motion by March 9, 1998. No response was filed, and on March 13, 1998, the hearing officer entered a recommended order dismissing this appeal. On April 27, 1998, a second request for an appeal was submitted by the Student's mother to the Indiana State Board of Education indicating that a residency hearing was held on April 13, 1998 by the school and that the Student was expelled.

The hearing officer, on April 29, 1998, entered a preliminary order rescinding the March 13, 1998 order of dismissal and again requested the parties to notify the hearing officer of dates they were available for a hearing on this appeal and directed the school to provide a copy of the record of the expulsion meeting. The school submitted the record and provided the hearing officer with available dates. The Student's mother failed to notify the hearing officer of available dates. The hearing in this matter was eventually scheduled for June 17, 1998 and the parties were notified by certified mail.

Present for the hearing were Duane E. Hodgin, Assistant Superintendent, Linda C. Knoderer, administrative assistant, Debbie Reinking, secretary, Skiles Test Elementary School, and Judith King, Principal, Skiles Test Elementary School. The Student's mother failed to appear. The hearing officer delayed the onset of the hearing to allow her extra time, and then started the proceedings at 1:15 p.m. The Student's mother never did appear during the course of the proceedings.

In her request for appeal, the Student's mother generally disagrees with the expulsion examiner's factual determinations and alleges bias on the part of the expulsion examiner due to her involvement in the case and because the expulsion examiner's employment by the school administration creates an obligation to the administration.

The hearing officer received into evidence the record of the proceedings conducted by the school and questioned those present (with the exception of Ms. Knoderer) as to the facts and procedures employed in conducting the school level review. The hearing officer noted at the outset that Linda Knoderer, who was present for the appeal, served as the expulsion examiner. The hearing officer advised Ms. Knoderer and those present that Ms. Knoderer would not be permitted to make any argument, present any testimony, or otherwise participate in the appeal. For reasons which are set forth below, the hearing officer's review in this matter is being conducted *de novo*. After a review of the written evidence and testimony, the hearing officer makes the following findings of fact, conclusions of law, and recommended orders:

FINDINGS OF FACT

1. During the 1997-1998 school year the Student was enrolled in the first grade at Skiles Test Elementary School within M.S.D. Lawrence Township.

2. At the time of the Student's initial enrollment at Skiles Test Elementary School in August, 1997, his mother filled out an Enrollment Form, 1997-1998, which indicated that the Student resided with both his mother and his father at 5639 Brendon Way Parkway. The home phone number was given as 898-3725. The mother provided the school with a copy of a lease dated March 15, 1997 for an apartment at 5639 Brendon Way Parkway.

3. On August 1, 1997, the Student's father entered into a lease agreement with Bruce A. Jones Co., Inc. to lease the premises located at 8332 Aspen Court. Occupancy of the leased premises under this agreement provides for the spouse and children, although no names are listed.

4. On August 21, 1997, Petitioner filled out the Student Transportation Information, giving the same home address and phone number as on the enrollment form and listing the address of 5712 Wiebeck Court as the sitter's address. The phone number listed for the sitter is 545-3725.

5. During class in September, 1997, while the first grade students were learning addresses, the Student indicated that he lived with his mother, father and brother at 8332 Aspen Drive.

6. 8332 Aspen Drive is located within the school district boundaries of the Indianapolis Public Schools.

7. On October 1, 1997, the school sent a letter to the Student's parents notifying them that the Student did not have legal settlement within the school district and that they would have to enroll the Student in the school corporation where they resided. A check with the management of Brendon Way Apartments indicated that Petitioner moved out of the Brendon Way apartment on May 5, 1997.

8. On October 13, 1997, the principal spoke with the Student's father regarding the residency. The father indicated he would enroll the Student in the correct school

9. The Student's mother called the principal on October 16, 1997 indicating that she and her husband were not together and that she resided with her parents in Brendon Way.

10. The school again contacted the management of Brendon Way Apartments who indicated that the Student's mother was not on the lease of her parents, Mr. and Mrs. Kiser, although the Student was listed on the lease. This lease was a renewal covering the period December 1, 1997 through November 30, 1998 and was entered into on September 25, 1997.

11. On October 16, 1997, the Student's mother submitted an affidavit of residency to the school. In this affidavit she indicated 8332 Aspen Court as her previous address.

12. The Student's mother showed the school an Indiana Driver's License that had been issued on October 17, 1997, giving an address of 5712 Wiebeck Court. She also provided the school with a letter from her employer, Netherland Insurance Company, stating that she had amended her records to show the 5712 Wiebeck Court address.

13. The school also contacted Carefree Day Care Center which the Student attends. Their records list both parents and the Student's brother as family members living at the Aspen Drive address.

14. On January 21, 1998, the Student's mother wrote a letter to the teacher. On the letter the Student's mother gave as her home phone numbers the telephone numbers for both the Aspen Drive and the Wiebeck Court addresses.

15. During the course of the school year, the Student continued to give 8332 Aspen Court as his address.

16. The school enlisted the assistance of Lawrence Police Officer Ron Shelnutt to verify residency. He visited the Wiebeck Court address at 6:30 a.m. Neither the Student nor his mother were there, although Mrs. Kiser did indicate that they lived there.

17. On February 23, 1998, the school sent a letter to the Student's mother at 5712 Wiebeck

Court. The letter was returned by the U.S. Post Office with a notation that she was "no longer at this address."

18. A residency hearing was conducted by the school on April 13, 1998. The Residency Hearing Officer rendered her written decision on April 15, 1998 determining the Student did not have legal settlement within the school corporation and was being expelled for illegal residency effective April 17, 1998.

19. Because Petitioner appealed this determination, the school did permit the Student to complete first grade at Skiles Test Elementary School.

20. The Residency Hearing Officer was the administrative assistant for the Assistant Superintendent. The Assistant Superintendent stated that he expected the hearing officer to render a fair decision and that, regardless of the decision rendered, there would be no adverse consequences to her position within the school corporation.

CONCLUSIONS OF LAW

1. Pursuant to Ind. Code § 20-8.1-6.1-10, the State Board of Education has jurisdiction over this matter.

2. Any Finding of Fact deemed to be a Conclusion of Law is hereby denominated as such. Any Conclusion of Law deemed to be a Finding of Fact is hereby denominated as such.

3. Petitioner has challenged the school's expulsion proceedings, in part, upon an allegation of bias because the residency hearing officer was a school employee who would have an obligation to administrators and supervisors within the school. School employees are not prohibited from serving as expulsion examiners provided certain criteria are met. Indiana Code 20-8.1-5.1-13(a) provides, in part:

> A superintendent of a school corporation may conduct an expulsion meeting or appoint one (1) of the following to conduct an expulsion meeting:
>
> (1) Legal Counsel
>
> (2) A member of the administrative staff if the member:
>
> (A) has not expelled the student during the current school year; and
>
> (B) was not involved in the events giving rise to the expulsion.

No evidence or testimony was presented that the residency hearing officer expelled the Student during the current school year or was involved in the events giving rise to the expulsion.

4. Indiana Code 20-8.1-1-6 defines "member of the administrative staff:"

> As used in this article, the term "member of the administrative staff" or comparable language means a school corporation employee who:

(1) is certificated under the statutes relating to the licensing of teachers; and
(2) has supervisory authority.

There is no indication in the record that the administrative assistant who served as the residency hearing officer falls within the definition of "member of the administrative staff" for purposes of conducting expulsion hearings. Because the local school expulsion proceedings were conducted by an improper person, the local expulsion decision must be vacated.

5. The Student resides with his parents on Aspen Drive. The Student is under the age of 18. I.C. 20-8.1-6.1-1(a).

6. The Aspen Court address of the Student's parents is the permanent and principal habitation of the Student and his parents, and is the Student's legal settlement. I.C. 20-8.1-6.1-1(b).

7. The Student did not establish legal settlement within the M.S.D. of Lawrence Township during the period of August, 1997 through June, 1998.

Discussion

An appeal of an expulsion due to legal settlement is generally conducted as a review of the local hearing decision to determine if the decision was supported by evidence, testimony and the law, and whether it was rendered in violation of established procedures or those required by law. In this case, the hearing officer has determined that proper procedures were not followed in that the hearing was not conducted by an appropriately licensed administrator with supervisory duties. Because of that, the decision of the school's hearing officer must be vacated. The Indiana State Board of Education does have authority to render its own findings of fact and conclusions of law and orders in disputes concerning legal settlement.

It should be noted that although twice requesting an appeal in the matter, the Student's mother has never responded to any of the requests of the hearing officer concerning the submission of dates for a hearing or to respond to the motion to dismiss. She failed to appear at the hearing in this matter. Although the Student's mother failed to appear or otherwise respond, the hearing officer did not hold her in default, but rather conducted a *de novo* review of the evidence to determine the facts independently of any determination made by the school. While the mother did submit a copy of her driver's license, a letter from her employer and a pay stub from her employer all showing the Wiebeck address, all of these exhibits were generated after the school began to question her residency, and none of these exhibits required proof of residency to have them produced. Even the lease that her parents entered into which showed the Student as a tenant was entered into during this time period and was a renewal that did not take effect for more than two months after its execution. During all of this time, the Student still maintained that he resided with both of his parents at the Aspen Court address, the mother still listed the Aspen Court telephone number as her home telephone number, and the school's investigations involving Brendon Way Apartments, the Lawrence Police officer and Care Free Day Care Center all confirmed that the Student did not physically reside at the Wiebeck address

but rather at the Aspen Court Address.

RECOMMENDED ORDERS

1. The decision of the school's residency hearing officer is hereby vacated as the hearing officer did not meet the required statutory definition of being a "member of the administrative staff."

2. The Student is expelled for not having legal settlement within the attendance area of M.S.D. Lawrence Township.

Dated: June 19, 1998

/s/ Dana L. Long
Dana L. Long, Hearing Officer for the
Indiana State Board of Education

INDIANA STATE BOARD OF EDUCATION ACTION

The Indiana State Board of Education, at its August 6, 1998 meeting, adopted the recommended decision of the Administrative Law Judge by unanimous vote.

APPEAL PROCEDURE

Any party aggrieved by the decision of the Indiana State Board of Education can seek judicial review from a civil court with jurisdiction within thirty (30) calendar days from receipt of this decision.

Indiana
State Board of Education
Room 229, State House • Indianapolis, Indiana 46204-2798
317/232-6622

BEFORE THE INDIANA
STATE BOARD OF EDUCATION

Edinburgh Comm. Sch. Corp.	)	
Petitioner	)	
	)	**Cause No. 9809028**
and	)	
	)	
Franklin Comm. Sch. Corp. and	)	
C.R.P., A Student,	)	
Respondents	)	
	)	
Determination of Legal Settlement	)	
Under I.C. 20-8.1-6.1-10(a)(3)(A)	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Edinburgh Community School Corporation (hereafter, "Edinburgh") requested on September 22, 1998, a determination by the Indiana State Board of Education of the legal settlement of C.R.P., a student attending school at the Franklin Community School Corporation (hereafter, "Franklin"). On September 23, 1998, a Hearing Examiner was appointed pursuant to I.C. 20-8.1-6.1-10(b)(6). All parties were notified of the appointment. After soliciting available dates of the parties, a hearing date was established for December 9, 1998, beginning at 10:00 a.m. in Room 225 of the State House.

Edinburgh was represented by its superintendent, Dr. Ron Mayes. Franklin was represented by its assistant superintendent, Mr. Robert M. Malinka. Although the parents of the Student were notified of the proceedings and were aware of the hearing date, no one appeared on behalf of the Student.

Edinburgh and Franklin, through their respective representatives, presented testimony regarding the legal settlement of the Student. Franklin submitted the sole document entered into evidence, Exhibit R-1. This exhibit consist of documents from the Johnson County Superior Court No. 2 regarding the guardianship of the Student. There are three separate documents: One is file-marked August 11, 1986; the second is file-marked December 10, 1996; the third is file-marked

November 25, 1998. These will be discussed in more detail below.

Based upon the testimony of the parties, the submitted documentary evidence, and the Indiana Code, the following Findings of Fact and Conclusions of Law are determined.

Findings of Fact

1. The Indiana State Board of Education has jurisdiction to determine the legal settlement of a student, as provided by I.C. 20-8.1-6.1-1. See I.C. 20-8.1-6.1-10(a)(3)(A).

2. C.R.P. is a senior in high school within the Franklin Community School Corporation, where she has been in attendance throughout her school history. She is presently 17 years of age. Her date of birth is February 28, 1981.

3. The parents of C.R.P. live within the boundaries of the Edinburgh Community School Corporation. However, the paternal grandparents live within Franklin.

4. Approximately three years ago, the superintendent of Edinburgh had reason to believe that C.R.P. had legal settlement within Edinburgh and not Franklin. He contacted the assistant superintendent for Franklin and expressed his concerns.

5. The assistant superintendent, who assumed his present responsibilities during the summer of 1990, inquired in the early autumn of 1996 as to the guardianship status of C.R.P. and indicated that Franklin would have to be provided with copies of any court order granting guardianship to the paternal grandparents.

6. Franklin was presented by the mother of C.R.P. with a court order dated August 11, 1986 (hereafter, the "1986 Order"). The 1986 order appointed the paternal grandfather as the temporary guardian over C.R.P. "for school enrollment purposes at Webb Elementary School..."

7. Franklin expressed reservations about the legality of the guardianship because it appeared to be solely for educational purposes and was for attendance at an elementary school although C.R.P. was then a secondary level student.

8. Franklin was then presented with a December 10, 1996, court order (hereafter, the "1996 Order") that amended the 1986 Order, removing references to "school enrollment purposes" and any reference to any particular school. The paternal grandfather remained the guardian, although the 1996 Order appointed him as the permanent guardian rather than the temporary guardian.

9. Thereafter, although it is not known when, the paternal grandfather died. After initiation of this proceeding but before the hearing on this matter, a court order was issued on November 25, 1998 (hereafter, the "1998 Order"), appointing the paternal grandmother as the successor guardian of C.R.P. The 1998 Order does not refer to "school enrollment purposes" nor does it mention any particular school. The 1998 Order was not solicited by Franklin. It was presented to counsel for Franklin by counsel for C.R.P.

10. Edinburgh and Franklin had received reports, some anonymous, that C.R.P. resided with her

parents rather than with her court-appointed guardian. However, at hearing on this matter, there was no concrete evidence from any specific source to verify who supports or cares for C.R.P., nor is there sufficient evidence to indicate with whom she lives. There is no testimony that the parents of C.R.P. can or cannot provide support for her.

Conclusions of Law

1. The 1986 Order establishing temporary guardianship for school attendance purposes is not permitted by Indiana law. I.C. 20-8.1-6.1-1(a)(3). Legal settlement cannot be established in this fashion. See In Re: H.W., *et al.* and the New Prairie United School Corporation, Cause No. 9601001 (SBOE 1996).

2. However, the 1996 Order and 1998 Order amended the 1986 Order by removing the school attendance purpose and altering the guardianship from a temporary one to a permanent one. Although the 1996 Order and the 1998 Order are exceedingly scant as to detail, they are, nonetheless, lawfully issued judicial decrees that are not legally infirmed on their respective faces. The State Board of Education does not have the authority to read into the 1996 Order and the 1998 Order a purpose that is not stated, to wit: the purpose of the permanent guardianship is for school attendance purposes. See In Re: A.S.C., J.F.O. and the Tippecanoe School Corporation, Cause No. 9410026 (SBOE 1995).

3. Once Franklin was alerted by Edinburgh that C.R.P. may not have legal settlement within Franklin, Franklin—through its assistant superintendent—appropriately inquired into the circumstances surrounding the guardianship of C.R.P. When presented with the 1986 Order, Franklin indicated its doubts as to its legality. The 1986 Order was amended through the 1996 Order, removing the school attendance purpose, a legal impediment. Franklin could legally rely upon the 1996 Order as establishing legal settlement for C.R.P. under I.C. 20-8.1-6.1-1(a)(3).

4. The 1998 Order substituted as the guardian the paternal grandmother for the now-deceased paternal grandfather, and again did not specify the reason for the guardianship was solely or primarily for school attendance purposes, as proscribed by I.C. 20-8.1-6.1-1(a)(3). Franklin could legally rely upon the 1998 Order as establishing legal settlement for C.R.P. under I.C. 20-8.1-6.1-1(a)(3).

5. The documentary evidence indicates C.R.P. has legal settlement within Franklin. The documentary evidence is not rebutted by any testimony upon which legally sufficient Findings of Fact or Conclusions of Law can be based.

Discussion

Edinburgh acknowledged at the hearing on this matter that it was not seeking any specific relief because of the legal settlement issue regarding C.R.P. Both Franklin and Edinburgh avow a positive working relationship with each other, which was evident in the hearing itself. Edinburgh and Franklin are both school districts experiencing growth. Growth is difficult to measure, which makes establishment of budgets equally speculative. Edinburgh has become

more thorough in determining legal settlement. The present dispute, as noted above, involves three years of discussions between the two public schools, the parents, and the grandparents. Both schools had received information from outside sources regarding the actual legal settlement status of C.R.P. Both acted appropriately in attempting to determine where C.R.P. had legal settlement. While the Hearing Examiner acknowledges that what is *legal* is not necessarily what is *real*, there is no evidence sufficient to rebut the legal sufficiency of the 1996 Order and the 1998 Order. As a consequence, it must be legally concluded that C.R.P. has legal settlement within the Franklin Community School Corporation.

Order

Respondent Student, C.R.P., has legal settlement within the attendance area of Respondent Franklin Community School Corporation.

Date: December 9, 1998 /s/ Kevin C. McDowell, Hearing Examiner

ACTION BY THE INDIANA STATE BOARD OF EDUCATION

The Indiana State Board of Education, at its meeting of January 7, 1999, and following oral argument on this matter, adopted the decision of the Hearing Examiner by unanimous vote.

Appeal Right

As provided by I.C. 20-8.1-6.1-10(e), any party aggrieved by the decision of the Indiana State Board of Education has thirty (30) calendar days from receipt of this written decision to seek judicial review in a civil court with jurisdiction.

Indiana
State Board of Education
Room 229, State House • Indianapolis, Indiana 46204-2798
317/232-6622

BEFORE THE INDIANA STATE BOARD OF EDUCATION

IN THE MATTER OF:	)	
	)	
Appeal from denial of transfer tuition from East Allen County Schools to Fort Wayne Community Schools for the 1997-19978 school year for F.V.D.	)	**CAUSE NO. 9708019**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Procedural History

Petitioner submitted a Transfer Request Application to Respondent on August 14, 1997, requesting a transfer due to curricular reasons. This request was denied by Respondent and Petitioner subsequently appealed to the Indiana State Board of Education. Petitioner's appeal was received by the Indiana State Board of Education on August 28, 1997, and on September 2, 1997, the undersigned was appointed hearing officer. The parties were notified of this appointment and were requested to notify the hearing officer of available dates for a hearing. Both parties submitted a list of dates, but as none of the dates on the two lists matched, the hearing officer requested that Respondent contact Petitioner to see if the two parties could agree upon a date. Respondent then indicated that the parties had agreed upon a date and the hearing was then scheduled for October 7, 1997. The parties were provided notice of the hearing and of their rights.

The Student F.V.D. was present, as was his mother and his sister. The Respondent school corporation was represented by legal counsel A. W. Fruechtenicht. A brief prehearing conference was conducted before the hearing at which time the procedures for the hearing and appeal were discussed. Witnesses were sworn and testimony was heard. During the course of the hearing, the following exhibits were introduced by Petitioner:

P-1 8/13/97 letter from Janet Perez, IB Coordinator, Fort Wayne Community Schools (FWCS)

P-2 10/2/97 letter from Nancy Schram, Manager of Personnel Services and Recruitment (FWCS)

P-3 South Side High School International Baccalaureate Curriculum

P-4 Comparison of the required IB curriculum with the curriculum offered at Paul Harding High School.

P-5 1997-1998 Curriculum Guide, South Side High School.

P-6 Paul Harding High School Curriculum Guide, 1997-1998.

P-7 Transcript.

P-8 Lists of North American Universities with International Baccalaureate Recognition Policies.

P-9 8/25/97 memorandum from Thomas Fowler-Finn, Superintendent, FWCS, to school board members concerning recommended charges for private transfer tuition for the 1997-1998 school year.

P-10 South Side High School International Baccalaureate Program Scale of Fees, 1996-1997.

Respondent objected to the admission of Exhibit P-4, which was a hand-written comparison of curriculums, on the grounds that the person who had prepared the exhibit was not present for questioning. The hearing officer noted the objection but admitted the exhibit, as curriculum guides for both high schools were also submitted as evidence. Petitioner's Exhibits P-1 through P-10 were admitted into evidence.

After consideration of the testimony and a review of all exhibits, the hearing officer makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. F.V.D. is a 10th grade student currently enrolled at and attending South Side High School, Fort Wayne Community Schools.

2. The Student resides with his mother within the attendance area of East Allen County Schools.

3. The Student's mother is the mother of five children. She highly values education and has instilled this value in her children. She is a single parent who immigrated from Africa in 1979 and has custody of three of her children. Of these three children, the oldest daughter is currently in law school at Howard University in Washington, D.C. The middle daughter, who was also present at the hearing, is a sophomore at Indiana University in Bloomington, where she is majoring in biology with plans to attend medical school. The youngest of the three is the

Student involved in the current transfer tuition dispute.

4. The Student's mother previously lived within the attendance area of East Allen County Schools through the Student's seventh grade year, during which time the Student attended East Allen County Schools.

5. During the Student's eighth and ninth grade years, the Student resided with his mother within the attendance area of Fort Wayne Community Schools and attended Geyer Middle School and South Side High School.

6. Due to the Student's excellent grades within the East Allen County Schools, the Student was placed into the more advanced eighth grade curriculum upon his enrollment at Geyer Middle School. Courses in the eighth grade included first year Spanish and Algebra.

7. By the end of the Student's eighth grade year, he was invited to participate in the International Baccalaureate (IB) Program at South Side High School.

8. The IB Program is a comprehensive and rigorous four-year curriculum leading to examinations. Its objectives are to provide students with a balanced education, to facilitate geographic and cultural mobility, and to promote international understanding through a shared academic experience.

9. The Student enrolled in the IB program and successfully completed the first year of the program. Of the approximately 40 students starting this program in the Student's grade level, only five are currently still in the program.

10. Due to financial considerations, the Student's mother had to move out of the Fort Wayne Community School district and move back into the East Allen County School District.

11. The Student has a strong desire, and the motivation, to complete the IB Program. He has strong academic aspirations, and is currently interested in chemistry, although he has not yet settled on a specific career goal. He believes the IB Program will further his academic aspirations by providing him an excellent academic background at the high school level which will facilitate advanced placement and/or credit at the university level. With the IB Program he will be able to complete his first year of college and/or qualify for advanced placement in college while still in high school, enabling the Student to experience greater academic opportunities.

12. In addition to Advanced Placement (AP) courses in English, calculus,[20] and biology or chemistry, the IB Program requires students to take examinations in six academic subject areas. At least three of these subject areas must be at the Higher level. Successful completion of these

[20]Although calculus is not listed as AP calculus, the South Side High School Curriculum Guide, in its course description for calculus, indicates that the course contains an in-depth coverage of all topics required for the AP Calculus Exam.

examinations results in advanced placement and/or credit at numerous universities, depending on the policy of each university. As an example, Indiana University awards up to 8 semester hours of advanced standing (transfer credit) for each Higher level exam where a grade of 5 or better is earned. Purdue University grants credit for scores of 4 or better earned on the Higher level subject examinations.

13. Students in the IB Program are required to take the following curriculum:

Ninth Grade	Tenth Grade
Honors English 1-2	Honors English 3-4
Foreign Language 3-4	Foreign Language 5-6
Honors Global Sociology	Honors World History
Honors Biology 1-2	Honors Chemistry
Algebra TWO	Advanced Math
Physical Ed. 1/Health	Physical Ed. 2/Art. Com./Speech
Elective	Elective

Eleventh Grade	Twelfth Grade
Honors English 5-6	IB/AP English 7-8
Foreign Language 7-8	Foreign Language 9-10
Adv. Biology or Adv. Chemistry	Government/Academic Econ.
Pre-Calculus	Calculus
IB Composition/IB Social Studies Topics	Theory of Knowledge
Elective	Elective

14. In addition to the above curriculum, students in the IB Program must write an extended essay and perform at least 150 hours in creativity, action and service (CAS). The Student has completed 50 hours of the CAS requirement.

15. The Student is currently enrolled in the tenth grade IB curriculum. His foreign language is Spanish. He is also enrolled in speech, and his elective course is computer programming.

16. The courses of honors chemistry and honors world history are not offered at Harding High School, which is the school the Student would attend if enrolled in the East Allen County Schools.

17. Students in the IB Program are placed in special sections of honors classes which are taught by teachers who have the requisite training for the IB Program. While these honors classes are not limited to IB students, IB students must take certain courses from teachers with the proper training.

18. Harding High School offers academic biology and biology II. It does not offer honors biology, advanced biology or AP biology. Harding High School does not offer five years of any

foreign language, which is required for the IB diploma. Harding High School does not offer the IB Program, and therefore does not offer any of the IB courses or Theory of Knowledge. Harding High School does offer the academic honors diploma and advanced placement courses in English, calculus and chemistry.

19. Students who drop out of the IB Program are not able to re-enroll in the program. Although the first two years (ninth and tenth grade) have been labeled as "pre-IB," all four years of the curriculum are required for the IB Diploma. Students cannot take the IB courses in the eleventh and twelfth grades if they were not in the program in ninth and tenth grades.

CONCLUSIONS OF LAW

1. Pursuant to Ind. Code § 20-8.1-6.1-10, the State Board of Education has jurisdiction over this matter.

2. Any Finding of Fact deemed to be a Conclusion of Law is hereby denominated as such. Any Conclusion of Law deemed to be a Finding of Fact is hereby denominated as such.

3. Indiana Code § 20-8.1-6.1-2 provides for the transfer of a student from the school corporation the student has a legal right to attend to another school corporation if the student may be "better accommodated" in the transferee school corporation. Subsection (a)(2) provides that whether a student can be better accommodated depends on such matters as . . . "curriculum offerings at the high school level that are important to the vocational or academic aspirations of the student.

4. Pursuant to Ind. Code § 20-8.1-6.1-11, the Indiana State Board of Education has promulgated rules to determine when a student may be "better accommodated" in another school corporation. These rules are found at 511 IAC 1-6-3. Petitioner brings this request under the academic provision of the Rule which specifically reads:

> Sec. 3. . . . a student will be better accommodated in the transferee than in the transferor, as provided by IC 20-8.1-6.1-2, on a showing of one or more of the following:
>
> ***
>
> (1) Curriculum:
>
> > (A) the student has established an academic or vocational aspiration, a curriculum offering at the high school level that is important and necessary to that aspiration is available to the student at the transferee, and that curriculum offering at the high school level or a substantially similar curriculum offering at the high school level is unavailable to the student at the transferor; . . .

5. F.V.D. has strong academic aspirations which include advanced study in chemistry and

advanced placement and credit at the university level in a number of subject areas to promote his ability to further his academic studies.

6. Petitioner identified a complete curriculum program (the IB Program) as important and necessary to his academic aspirations. Successful completion of the IB Program and examinations, coupled with the advanced placement courses, will provide the Student with the opportunities he desires for advanced placement and credit in college. Should the Student pass the Higher level IB exams and the available AP exams, he has the potential to earn a year or more of college credit in the IB Program. The IB Program is important and necessary to the Student's academic aspirations.

7. Although Harding High School does offer an academic honors diploma and several advanced placement courses, the IB Program curriculum is not available in any East Allen County Schools high school. Harding High School does not offer honors chemistry and honors world history, courses in which the Student is currently enrolled. Harding High School does not offer a similar curriculum offering nor even those courses which are required for the 9th and 10th grade years that have also been labeled as "pre-IB."

Discussion

The Indiana State Board of Education has considered and denied three other transfer request applications based upon an academic pursuit of the International Baccalaureate diploma. In In the Matter of T.M., Cause No. 940813 (SBOE 1995), the State Board denied a transfer request for a ninth grade student, noting that the IB diploma program involves a student only in the student's 11th and 12th grades and that the IB diploma is not considered a vocational or academic aspiration under 511 IAC 1-6-3(1). That decision was reiterated in In the Matter of K.L.W., Cause No. 9409022 (SBOE 1995) and later in In the Matter of K.M.W., Cause No. 9511024 (SBOE 1996).

While inclined to follow the previous decisions of the Indiana State Board of Education, the specific facts and circumstances of the instant case compel a different result. While in prior cases it was determined that the IB Program was only available for 11th and 12th grade students, the testimony and written documentation in this case clearly established that the IB Program is a four year curriculum. Failure to complete any level of the program will prevent a student from continuing on at higher levels. Further, the Student in this case does not view the IB diploma itself as his academic aspiration, but the IB diploma is a means to further his academic aspirations and to enable him to fulfill the high academic goals which both he and his mother have for him. While the Student has not identified a "specific" aspiration as required in some previous cases, the Indiana State Board of Education recognized in its oral discussion in In the Matter of S.G., Cause No. 9510020 (SBOE 1996) that neither the statute nor the rule require a "specific" aspiration. Indeed, IC 20-8.1-6.1-2 refers to "academic aspirations." This Student aspires to academic excellence and advancement, both at the high school and college levels. The IB Program is important to that aspiration.

ORDER

The East Allen County Schools shall pay the transfer tuition for the Student to attend South Side High School for the 1997-1998 school year.

Dated: October 21, 1997

/s/ Dana L. Long
Dana L. Long, Hearing Officer for the
Indiana State Board of Education

INDIANA STATE BOARD OF EDUCATION ACTION

After oral argument the Indiana State Board of Education, at its December 4, 1997, meeting, adopted the decision of the Administrative Law Judge by unanimous vote.

APPEAL PROCEDURE

Any party aggrieved by the decision of the Indiana State Board of Education can seek judicial review from a civil court with jurisdiction within thirty (30) calendar days from receipt of this decision.

Indiana Department of Education

Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

Indiana Department of Education **Division of Special Education**

COMPLAINT INVESTIGATION REPORT

COMPLAINT NUMBER: 1305.98
COMPLAINT FILED BY:
COMPLAINT INVESTIGATOR: Becky Bowman

COMPLAINT ISSUE(S):

Whether the Danville Community School Corporation and the West Central Joint Services violated:

34 CFR §300.300 and 511 IAC 7-2-23 with regard to providing the student a free appropriate public education by denying credits for course work successfully completed during homebound instruction.

TELEPHONE CONTACTS:

Name	Relationship to Student	Dates
	complainant/parent	August 20, 1998
	complainant/parent	August 20, 1998
Shirley Amond	local director of special education	August 20, 1998

DOCUMENTS RECEIVED BY INVESTIGATOR FROM:

Complainant:

Letter of complaint, dated August 19, 1998, and received by the division of special education (the "Division") on August 20, 1998.
FAX response, dated August 21, 1998 and received by the Division the same day, including cover sheet from complainant and copy of letter from the school corporation Superintendent to the complainant, dated July 15, 1998, regarding Board decision to decline awarding credit educational services during expulsion.

School:

Cover letter, undated, and received by the Division on August 31, 1998, with the following attachments:
- a copy of a letter from the school corporation Superintendent to the complainant, dated July 15, 1998,
- a copy of a handwritten document signed by the Student's teacher, dated May 27, 1998, regarding the Student's successful completion of the courses in the tenth grade curriculum,
- a copy of the *Parent Permission to Place* and *Case Conference Summary/IEP* dated May 27, 1998,
- a copy of the *Notification of Case Conference/Annual Case Review Meeting*, dated May 19, 1998,
- a copy of a letter from the complainant to the School, dated April 30, 1998,
- a copy of the *Case Conference Summary/IEP*, dated March 19, 1998,

a copy of the *Notification of Case Conference/Annual Case Review Meeting*, dated March 5, 1998,
a copy of a letter to complainant from the Special Education Designee, dated November 14, 1997,
a copy of the *Case Conference Summary/IEP*, dated November 14, 1997,
a copy of the *Parent Permission to Place*, dated November 14, 1997,
a copy of the Student's Psychoeducational Evaluation, dated May 13, 1997,
a copy of the *Written Charge and Request for Expulsion: Appointment of Expulsion Examiner*, dated November 12, 1997,
a copy of the *Notification of Case Conference/Annual Case Review Meeting*, dated November 10, 1997, and
a copy of the *Case Conference Summary/IEP*, dated August 20, 1997.

FINDINGS OF FACT:

1. The student ("Student") is seventeen years old and is eligible for special education and related services as a student with learning disabilities and an emotional handicap.

2. A case conference committee ("CCC") meeting, convened on November 14, 1997, determined that no causal relationship existed between the Student's disabilities and the alleged misconduct for which the School sought to expel the Student. The CCC recommended homebound or neutral site instruction during the period of expulsion. The Student's *individualized education plan ("IEP")* included goals that the Student would complete tenth grade special service English, science, and math curriculums, as well as improve his reading and spelling skills. Homebound or neutral site instruction would be provided five hours per week with the teacher for learning disabilities. The *Individualized Transition Plan* component of the *CCC report* states that the Student is on a credit/diploma track with graduation projected in the year 2000. Nothing in the CCC report or the *IEP* indicates that the Student would not receive credit for the classes provided via homebound instruction.

3. Another CCC meeting was convened on March 19, 1998 for the purpose of a "60-Day Review." The annual goals and placement remained the same as identified at the previous CCC meeting. However, the *CCC report* states that the Student "will not receive credit for coursework completed while expelled, according to superintendent's decision."

4. In a document dated May 27, 1998, the Student's homebound teacher states that the Student has completed the necessary course work in order to earn credits for the tenth grade in the following subjects: English 10, math 10, health, science 10 and reading.

5. On July 15, 1998, in a letter to the complainant, the School confirmed that, pursuant to the School Board's decision, the Student would not be awarded credit for the course work completed during homebound instruction.

CONCLUSIONS OF LAW:

1. Pursuant to the Individuals with Disabilities Education Act (20 USC §1400 *et seq.*) and Indiana's implementing regulations, the School must provide a free appropriate public education to eligible students. A free appropriate public education contemplates that a student with a disability who has satisfied course work requirements is entitled to the same course credit that would be granted to a non-disabled student completing the same course work requirements.

   The School is not relieved of its obligation to provide a free appropriate public education to a student with a disability when that student is expelled. Pursuant to 511 IAC 7-15-2(n), educational and

related services, as determined by the case conference committee, must be continued during any period of expulsion of a student with a disability.

Findings of Fact #2 and #3 reflect that the Student was expelled on November 14, 1997 and was to be provided with five hours per week of homebound instruction during the period of expulsion. Finding of Fact #4 demonstrates that, as a result of this homebound instruction, the Student successfully completed the course work for tenth grade English, math, health, science and reading. Findings of Fact #3 and #5 reflect that the school superintendent determined that the Student would not receive credit for the course work completed during the period of homebound instruction, and the school board affirmed this decision.

The School's denial of credit for successfully completed course work constitutes a failure to provide a free appropriate public education as contemplated by 34 CFR §300.300 and 511 IAC 7-2-23. Therefore, a violation is found.

DISCUSSION:

The Individuals with Disabilities Education Act ("IDEA"), as amended effective June 4, 1997, requires each State to ensure "[a] free appropriate public education ["FAPE"] is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." 20 U.S.C. §1412(a)(1)(A). A FAPE under IDEA includes, in relevant part, an appropriate public school education that meets the State's standards and is "provided in conformity with the individualized education program ["IEP"] required under section 1414(d)." 20 U.S.C. §1401(8)(B)-(D). The IEP is "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d)." 20 U.S.C. §§1401(11), 1414(d)(1)(A). The IEP must include, among other requirements, "a statement of measurable annual goals, including benchmarks, or short-term objectives, related to . . . meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum . . ." 20 U.S.C. §1414(a)(1)(A)(ii)(I). Additionally, the IEP must include a statement of the special education, related services, and supplementary aids and services to be provided the child necessary for the child "to advance appropriately toward attaining the annual goals" as well as "to be involved and progress in the general curriculum. . ." as appropriate. 20 U.S..C. §1414(a)(1)(A)(iii)(I), (II). The IEP must also include a statement as to how the child's progress toward annual goals will be measured and how the child's parents will be regularly informed of their child's progress and the extent to which the progress is sufficient to achieve the goals by the end of the year. 20 U.S.C. §1414(a)(1)(A)(viii).

The determination of a FAPE for students with disabilities is vested with the "IEP Team." 20 U.S.C. §1414(a)(1)(B); (3), (4). In Indiana, the IEP Team is more commonly known as the Case Conference Committee ("CCC"). The CCC, composed primarily of both parents and school representatives, is the only body empowered to determine a student's eligibility for special education and related services; develop, review, and revise the IEP in accordance with IDEA and 511 IAC 7-3 *et seq.* ("Article 7"); and determine placement in the least restrictive environment. In Indiana, the CCC determines what constitutes a FAPE for any student with a disability, including whether the student will receive credit for course work successfully completed during a period of suspension or expulsion.

CCC agreement is achieved when the parents and the school representative concur regarding those elements that constitute a FAPE for the student. Should the parents and the school representative fail to reach an agreement, either may seek a due process hearing as a means of resolving the dispute. 511 IAC 7-15-5. Special education mediation is another means of dispute resolution, but both parties must consent to this method of resolution. 511 IAC 7-15-3. Other individuals attending the CCC meeting, though necessary and important to the CCC process, may submit a written opinion, including an opinion expressing disagreement, but may not seek resolution through due process remedies. 511 IAC 7-12-

1(m)(6); 511 IAC 7-15-5. However, under no circumstances are the decisions of the CCC to be vetoed or unilaterally altered outside the framework of the CCC by someone "at a higher administrative level. . ." See 34 CFR Part 300, Appendix C, Policy Letter No. 13 (Federal Register, Vol. 57, No. 189, September 29, 1992, p. 44835).

In this situation, the parents and the school representative reached agreement at the CCC meeting in November, 1997, with regard to a FAPE during the period of expulsion. No limitations concerning course credit were identified in the IEP resulting from this CCC meeting. Any amendment to the November IEP required the CCC to reconvene and reach agreement on any proposed changes. Federal and state special education regulations preclude unilateral decisions in a CCC's determination of a FAPE, as occurred in this situation, when at a subsequent CCC meeting, a statement that the student "will not receive credit for coursework completed while expelled <u>according to the superintendent's decision</u>" was included in the IEP. (Emphasis added).

The Department of Education, Division of Special Education issues the following Orders based on the Findings of Fact and Conclusion of Law listed above.

ORDER(S):

1. The School shall award the Student the appropriate credit for the course work completed during homebound instruction during the 1997-1998 school year.

2. No later than September 28, the School shall convene the CCC to ascertain that the Student's current course of study, as identified in the Student's *IEP,* is sequentially consistent with the Student's successful completion of the tenth grade subjects, and on track with graduation projected in 2000. The School shall submit a copy of the Student's *IEP* to the Division no later than October 5, 1998.

DATE REPORT COMPLETED: September 16, 1998

BEFORE THE INDIANA STATE SCHOOL BUS COMMITTEE

IN THE MATTER OF:	)	
	)	
Appeal from denial of waiver of	)	
575 IAC 1-5.5-3(g) for New Albany-	)	**CAUSE NO. 1-98**
Floyd County Consolidated Schools	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Procedural History

On May 6, 1998, the school and the Student's parents submitted a letter to the Indiana State School Bus Committee requesting a waiver of the requirements of 575 IAC 1-5.5-3(g) pertaining to the weight limit for a wheelchair to be used to transport C. D. on a school bus. On May 21, 1998, the State School Bus Committee postponed action on the request for waiver in order to investigate the new SAE (Society of Automotive Engineers) standard, J-2249. On July 24, 1998, the State School Bus Committee denied the request for waiver. On August 6, 1998, the school and parents jointly requested a hearing pursuant to 34 CFR § 104.36.

The undersigned was appointed as hearing officer on August 11, 1998 and requested the record of the proceedings before the State School Bus Committee. The hearing in this matter was scheduled for September 17, 1998. Present for the hearing were the Student's father, the special education director for the school, and the chairman of the State School Bus Committee. Documents had been exchanged prior to the hearing and were admitted without objection. Additional documents and photographs were submitted during the course of the hearing without objection. During the course of the hearing, the chairman of the State School Bus Committee referred to SAE standard J-2249. This standard had not been submitted by either party into evidence. The hearing officer requested the chairman to provide a copy of SAE standard J-2249, which was received by the hearing officer the following day. After consideration of the testimony and a review of all of the exhibits, the hearing officer makes the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

3. The Student is 15 years old and in the ninth grade in the school.

4. The Student has been diagnosed with spastic cerebral palsy quadriplegia and is non-ambulatory.

5. The Student has outgrown his previous wheelchair, a Zippie P-500 by Quickie and in January, 1998 the Student received a new wheelchair. The new wheelchair is a Permobil Chairman with stand and tilt system.

6. The Permobil Chairman wheelchair is medically necessary as it increases circulation in the Student's lower extremities. The tilt system allows for pressure relief to maintain skin integrity. The chest harness, seat belt, cushions, headrest, trunk support, hip guides and shoe holders provide for proper positioning and safety.

7. The standing feature of the wheelchair places the Student at the same level as his peers where he can work freely. The joystick control and lift system of the wheelchair provide for greater independence for the Student and increased opportunities for social interaction and participation in school activities.

8. Until the Student received his new wheelchair in January, 1998, he was provided transportation by the school in a school bus.

9. The Indiana State School Bus Committee's rule provides that "[a] wheelchair transported in a school bus cannot exceed fifty-three (53) inches in length and two hundred (200) pounds in weight, excluding the weight of the occupant, and thirty (30) inches in width. The Student's new wheel chair weighs in excess of 200 pounds.

10. The Student is currently being transported to school in a van. Vans used to transport students in wheelchairs are not subject to the regulations pertaining to school buses.

11. The school uses restraint systems from two different manufacturers for use in its school buses and vans. Buses and vans used for transporting students in wheelchairs are equipped with either the Q-Straint or Kinedyne WTORS (wheelchair tie down and occupant restraint systems).

12. Both the Q-Straint and Kinedyne WTORS meet the requirements of 49 CFR Part 38[21] and 49 CFR § 571.222[22] as well as the Indiana requirements found at 575 IAC 1-5.5-4.[23] These requirements are similar to the recommendations of the Society of Automotive Engineers (SAE) recommendations found in SAE Standard J-2249.

13. The manufacturer of the wheelchair has placed no restrictions on its transportation other than the use of an approved WTORS.

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[21]Americans with Disabilities Act (ADA).

[22]School Bus Passenger Seating and Crash Protection.

[23]575 IAC 1-5.5-4 requires that wheelchair securement and tie down devices must be provided that retrains a wheelchair during a thirty (30) miles per hour, twenty (20) G frontal impact with a 50th percentile male frontal impact test dummy weighing one hundred seventy (170) pounds restrained by a lap/shoulder harness anchored to the wheelchair or to the tie down hardware at the lower anchor points, the results of which frontal impact tests must be verified by the tie down system manufacturers.

14. There are no wheelchair weight limitations imposed by federal regulations.

15. In preparing for the hearing in this matter, both parties sought advice and recommendations for transporting heavy wheelchairs from manufacturers of wheelchairs and restraint systems, and universities.

16. Both parties received similar recommendations for transporting heavy wheelchairs; i.e., wheelchairs in excess of 275 pounds should only be transported in a larger vehicle, over 10,000 pounds, and that more than two rear tie downs should be used.

17. United States Department of Transportation statistics show that during a five year period of time vans were involved in 48% of the injuries to wheelchair uses related to motor vehicles. Passenger cars were involved in 30% of the injuries and buses involved in 12% of the injuries. The remaining 10% of the injuries involved ambulances (7%) and trucks (3%).

CONCLUSIONS OF LAW

1. The hearing officer has jurisdiction pursuant to 34 CFR § 104.36.

2. Any Finding of Fact deemed to be a Conclusion of Law is hereby denominated as such. Any Conclusion of Law deemed to be a Finding of Fact is hereby denominated as such.

3. C. D. is a "qualified handicapped person" within the meaning of 34 CFR § 104.3(k).

4. C. D. must be provided with a free appropriate public education pursuant to 34 CFR § 104.33.

5. Both the school's vans and school buses use the same wheelchair tie down and occupant restraint systems (WTORS).

6. Due to the heavy weight of the Student's wheelchair, safer transportation would be provided in a vehicle with a weight in excess of 10,000 pounds.

7. Due to the heavy weight of the Student's wheelchair, two additional rear tie down straps should be used to provide safe transportation.

ORDER

In consideration of the foregoing Findings of Fact and Conclusions of Law, the Indiana State School Bus Committee is hereby ordered to waive the requirements of 575 IAC 1-5.5-3 (g) for C. D. Whenever possible, the school shall use two additional rear tie down straps in transporting the Student.

Dated: September 25, 1998

Dana L. Long, Hearing Officer
Indiana Department of Education
Room 229 State House
Indianapolis, IN 46204-2798
(317) 232-6676

Appeal Procedure

Any party wishing to object to this order may do so by petition to the circuit court of competent jurisdiction for judicial review of this order under I.C. 4-21.5-5-5. A petition for judicial review must be filed within thirty (30) days of the date of this order. The party seeking judicial review should refer to the statute cited for the particulars of the right to petition for review.